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IN THE

Supreme Court of the United States

October Term 1981

No. .....

THE F/V AMERICAN EAGLE, ADF&G No. 39, and $100,677.50 REPRESENTING THE PROCEEDS OF 143,825 lbs. OF ALASKA KING CRAB DELIVERED PURSUANT TO ADF&G FISH TICKET NOS. E95626 AND E95627,
Appellant,

v.

STATE OF ALASKA,
Appellee.

ON APPEAL FROM THE
SUPREME COURT OF THE STATE OF ALASKA

JURISDICTIONAL STATEMENT

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PRELIMINARY STATEMENT

Claimants-Appellants are the owners of the F/V AMERICAN EAGLE and appeal from the order of the Supreme Court of the State of Alaska entered on the 21st day of November, 1980 (rehearing denied March 4, 1981). The appeal is taken pursuant to Title 28, United States Code, Section 1257(2). In the event this Court holds that jurisdiction is not vested pursuant to said statute, appellants request that this statement be regarded as a petition for a writ of certiorari under 28 U.S.C. § 2103.

QUESTIONS PRESENTED BY THE APPEAL

1. Whether Alaska may assert jurisdiction over the king crab fishery in the North Pacific Ocean outside Alaska territory.

2. Whether the federal government has exclusive jurisdiction of the living resources of the Continental Shelf, including crab.

3. Whether Alaska may regulate and control fishing by citizens of other states outside Alaska territory.

4. Whether the Alaska regulations purporting to describe the offshore area sought to be regulated were so vague as to deny claimants due process.

5. Whether claimants were denied due process by the absence of any procedure under Alaska law for in rem forfeiture cases and by the failure to provide a prompt post-seizure hearing.

PARTIES TO THE APPEAL

Claimants are Severin Hjelle, Harold Hansen, and Ryder Tynes, who are citizens of the State of Washington and who have made claim to the F/V AMERICAN EAGLE and her catch as owners. Appellee is the State of Alaska, which prosecuted the forfeiture action against the res.

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JURISDICTIONAL STATEMENT

OPINIONS IN THE COURTS BELOW

The opinion of the Supreme Court of Alaska is reported at 620 P.2d 657 (1980), and is set forth in the appendix as Appendix A. The findings, judgment, and final order of the trial court, the Superior Court for the State of Alaska, are set forth in Appendix F.

GROUNDS FOR INVOKING JURISDICTION

1. Nature of the Proceeding.

This case is a civil action in which a bond in the amount of $350,000.00, given as security for the F/V AMERICAN EAGLE, was ordered forfeited by the Superior Court of the State of Alaska, together with her catch, valued at $100,677.50 (Appendix F).[1] The forfeiture was based on activities of the AMERICAN EAGLE outside Alaska's territory. The claimants are the owners of the F/V AMERICAN EAGLE and are citizens of the State of Washington. Claimants contested the extraterritorial assertion of jurisdiction by Alaska on grounds of due process, the Supremacy Clause and the Commerce Clause. Claimants also contested the Alaska regulations on grounds of vagueness and challenged the Alaska civil forfeiture procedure for lack of due process.

2. Entry of the Judgment Sought To Be Reviewed.

On November 21, 1980, the Alaska Supreme Court entered an opinion and order affirming the order of forfeiture (Appendix A). On March 4, 1981, the Alaska Supreme Court entered an order denying a timely petition for rehearing (Appendix C). On April 6, 1981, the notice of appeal to this Court was filed in the Alaska Supreme Court (Appendix E).

3. Statutory Basis for Jurisdiction.

Jurisdiction is vested in this Court pursuant to Title 28, United States Code, Section 1257(2).

Claimants challenged the assertion of extraterritorial jurisdiction by Alaska solely on the basis of the Federal Constitution. Claimants further attacked the vagueness of the

1. In addition to the sums ordered forfeited, an award of $55,000.00 in attorney's fees was imposed against claimants.

regulations and the Alaska civil forfeiture procedure on federal due process grounds. Under 28 U.S.C. § 1257(2), an appeal may be taken where the validity of a state statute or regulation is drawn in question and the decision is in favor of validity. Review of the "statute" extends to every act legislative in character, including the regulations issued by the Alaska Board of Fisheries. *Sultan Ry. & Timber Co. v. Department of Labor & Industries*, 277 U.S. 135 (1928); *Hamilton v. Regents*, 293 U.S. 245 (1934). The statute or regulation does not have to be invalid on its face if invalid in the manner of application. *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921); *Cohen v. California*, 403 U.S. 15 (1971).

Claimants squarely challenged the constitutionality of the Alaska statutes and regulations, both facially and as applied, and the Alaska Supreme Court just as squarely sustained their validity, as applied. "Under these circumstances, this Court's appellate jurisdiction would seem manifest." *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 440 (1979).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, AND REGULATIONS

The pertinent test of all constitutional provisions, statutes, and regulations are set forth in Appendix I. They are:

Constitution of the United States:
- Article I, Section 8
- Article VI, Clause 2
- Fourteenth Amendment, Section 1

Federal Acts, Proclamations, Treaties:
- Alaska Statehood Act (July 7, 1958)
  72 Stat. 339, § 6(m)

Submerged Lands Act (May 22, 1953)
43 U.S.C. §§ 1301-1315

Outer Continental Shelf Lands Act (August 7, 1953)
43 U.S.C. §§ 1331-1343

Prohibition of Foreign Fishing Vessels in the Territorial Waters of the United States (1964)
16 U.S.C. §§ 1081-85 (repealed March 1, 1977)

Fisheries Zone Contiguous to Territorial Sea of the United States (1966)
16 U.S.C. §§ 1091-94 (repealed March 1, 1977)

Fishery Conservation and Management Act of 1976 (effective March 1, 1977)
16 U.S.C. §§ 1801-82

Presidential Proclamation, September 28, 1948, Regarding the Continental Shelf Convention on the Continental Shelf (1958)

Alaska Statutes:

16.05.190 Seizure Without Warrant and Confiscation by Court

16.05.195 Forfeiture of Equipment

16.10.200 Unlawful Taking Prohibited

16.10.210 Unlawful Sale or Offer Prohibited

16.10.220 Penalties for Violation of § 200 and § 210 of this Chapter

Regulations of the Alaska Board of Fish & Game:

Regulations in Effect Now and at all Relevant Times:

5 AAC 36.010 Description of Area

Pre *Hjelle v. Brooks* Regulations:

5AAC 07.760 (repealed June 15, 1974) Quotas

5 AAC 36.040 (repealed June 15, 1974) Transportation and Possession of Shrimp, Scallops, and King, Dungeness or Tanner Crabs

Post *Hjelle v. Brooks* Regulations:

5 AAC 34.005 Statistical Areas Established
5 AAC 34.035 Closure of Registration Areas
5 AAC 34.090 Unlawful Possession of King Crab or King Crab Gear
5 AAC 34.098 Violation of Regulations
5 AAC 34.600 Description of Statistical Area
5 AAC 34.605(e) Description of Districts
5 AAC 34.610 Fishing Season
5 AAC 34.900 Description of Statistical Area

Post *State v. Uri* Regulations:

5 AAC 34.005 Statistical Areas Established
5 AAC 34.010 Application of Regulations
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STATEMENT OF THE CASE

On January 15, 1976, the AMERICAN EAGLE was seized at Pelican, Alaska, by officials of the Alaska Department of Public Safety. Thirteen days later a civil complaint was filed at Kodiak, Alaska, by the Alaska Attorney General, praying for forfeiture of the vessel and her catch for violation of Alaska regulations governing king crab fishing.

Claimants Harold Hansen, Severin Hjelle, and Ryder Tynes, all citizens of the State of Washington, appeared in the action as owners of the vessel. Claimants by answer (1) denied the jurisdiction of Alaska to regulate king crab fishing and Washington citizens outside Alaska territory, and (2) contended that the regulations sought to be enforced were void for vagueness. On February 10, 1976, over three weeks after seizure, the AMERICAN EAGLE was released after claimants were able to obtain an agreement to the posting of a $350,000.00 bond.

The case was scheduled for trial on March 29, 1977, and then continued to July 25, 1977, over claimants' objections. At trial the evidence presented by the State showed that the AMERICAN EAGLE and her gear were sighted in an area approximately six to nine miles off the Alaska coast. (Ex. 2, Tr. 140-144, 352). *See* Appendices D (Ex 2) and J (State Department delineation of three-mile limit).

By motions to dismiss submitted to the trial court and on appeal to the Alaska Supreme Court, claimants: (1) contested the extraterritorial assertion of jurisdiction, contending it denied claimants due process, and was violative of the Commerce Clause and the Supremacy Clause of the federal Constitution;[2] (2) attacked the Alaska regulations as void for vagueness under the Fourteenth Amendment, and (3) attacked the Alaska procedure for in rem forfeiture both facially and as applied to claimants for lack of due process. The motions to dismiss were denied by the trial court and the Alaska Supreme Court affirmed each ruling.

2. Claimants contend that Alaska was prohibited from regulation of king crab fishing because such crab are living creatures of the shelf and subject to the exclusive regulation of the federal government under the Outer Continental Shelf Lands Act, the Submerged Lands Act, and the area is subject to exclusive federal control.

THE SUBSTANTIAL NATURE OF THE QUESTIONS PRESENTED REQUIRES PLENARY CONSIDERATION

1. Alaska's Exercise of Extraterritorial Jurisdiction Constitutes a Denial of Due Process and Violates the Commerce Clause.

It has been long established that the exercise of jurisdiction by a state outside its boundaries is a denial of due process of law. *Allgeyer v. Louisiana*, 165 U.S. 578 (1897); *Norfolk & Western Ry. v. Missouri Tax Commission*, 390 U.S. 317 (1968). Such assertion of jurisdiction is also an unreasonable burden on interstate and foreign commerce. *Norfolk & Western Ry. v. Missouri Tax Commission, supra*, 390 U.S. 317; *cf. Florida Avocado Growers v. Paul*, 373 U.S. 132 (1963); *Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959).

It is not disputed that the activities of the AMERICAN EAGLE took place more than three miles from the Alaska coastline and outside that line as drawn by the United States Department of State.[3] (Appendix J.) It also is firmly established that the Alaska territorial boundary extends only three miles from shore. *United States v. Alaska*, 422 U.S. 184 (1975); *United States v. Maine*, 420 U.S. 515 (1975); *United States v. California (Second California)*, 381 U.S. 139 (1965). This principle was apparently accepted by the court below when it assumed "that the operations were beyond the three-mile limit." *F/V AMERICAN EAGLE v. State*, 620 P.2d 657, 660, Appendix A at 10.

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3. Alaska in its brief to the Alaska Supreme Court made an assertion that because of a headland-to-headland line, perhaps the AMERICAN EAGLES's activities took place within Alaskan territory. This argument was not raised before the trial court, no supporting evidence was offered by the State, and the Alaska Supreme Court assumed that the violations did occur beyond the three mile limit. 620 P.2d 657, 662. Appendix A, p. 10.

To support its extraterritorial assertion of jurisdiction, the Alaska Supreme Court relied on *State v. Bundrant*, 546 P.2d 530 (Alaska), *appeal dismissed sub nom. Uri v. State*, 429 U.S. 809 (1976) (for want of jurisdiction). *Bundrant* was a two-to-one decision of the same court published one week after the AMERICAN EAGLE allegedly violated the law.[4]

The opinions of the Alaska Supreme Court in this case and in *Bundrant, supra*, are a clear departure from existing law. This Court in its decision in *Skiriotes v. Florida*, 313 U.S. 69 (1941), held that a state might be allowed to regulate its own citizens outside its boundaries based upon the duty of the citizen in relation to the citizen's own government. 313 U.S. 69, 73.[4A] Claimants here are citizens of the State of Washington, not Alaska.

In *Alaska v. Arctic Maid*, 366 U.S. 199 (1961), in which Alaska attempted to tax salmon freezer boats operating within Bristol Bay, the operators of the freezer boats were citizens of Washington and California. This court held that

4. Several court decisions were involved in the *Uri* and *Bundrant* cases. A brief explanation of the chronology may be helpful. *State v. Uri* was a consolidated case involving 16 criminal defendants charged with violation of Alaska crab regulations for activities in an area between 16 and 60 miles from shore. Those charges were dismissed by the superior court on grounds of exclusive federal jurisdiction by Judge Burke (*Uri I*, Appendix L). On appeal, the *Uri* cases were consolidated with *State v. Bundrant* and decided under that name. After the *Bundrant* decision, review by this Court was sought by the *Uri* defendants but was denied when the State argued that *Bundrant-Uri* was not a final decision. (Uri II, 429 U.S. 806.) On remand to the superior court for trial, all 16 *Uri* cases were dismissed on grounds the regulations in question were void for vagueness. (Uri III, Appendix G.) In *Uri*, Alaska also contested this Court's appellate jurisdiction on the ground that passage of the Fishery Conservation and Management Act of 1976 (FCMA), 16 U.S.C. § 1801 *et seq.*, made the federal question of jurisdiction less substantial. However, to this date Alaska has continued to assert extraterritorial jurisdiction over the king crab both by current regulations and by vessel seizure.

4A. Accord, *People v. Weeren*, 163 Cal. Rptr. 255, 607 P.2d 1279, *cert denied*, ___ U.S. ___, 66 L.Ed.2d 45 (1980).

only those operations within the three-mile limit would be subject to the tax, concluding "if the fish were taken or purchased outside Alaska's territorial waters, all of respondent's business in the Bristol Bay area would be beyond Alaska's reach." 369 U.S. 199, 203. This case presents a similar situation.

The opinion below also conflicts with the decision of the Washington Supreme Court in *Northwest Trollers v. Moos*, 89 Wn.2d 1, 568 P.2d 793 (1977), which held that "Washington cannot regulate fishing beyond its three-mile limit by Oregon or California citizens." 89 Wn.2d 1, 5.

Both in *Bundrant* and in its opinion in this case, the Alaska Supreme Court refused to follow the reasoning of the three-judge court in *Hjelle v. Brooks*, 377 F. Supp. 441 (1974),[5] which had issued a preliminary injunction against Alaska's regulations purporting to set a quota for king crab fishing in the entire Bering Sea. The *Hjelle* court concluded that, to be constitutional, a state regulation must be directed toward conserving a resource within a state; if so directed, a regulation might have an indirect impact on extraterritorial conduct and yet be constitutional. Typical of such regulations are landing laws administered to facilitate enforcement of conservation schemes for resources within a state. Such regulations may be enforced against noncitizens found within the state boundaries. 377 F. Supp. 441.

At the other extreme are regulations having a direct impact on extraterritorial conduct. The *Hjelle* court found that the Alaska regulations which it was considering were expressly directed at activities outside Alaska territory. Such a scheme could not withstand constitutional attack. Alaska's

5. The named plaintiffs included Severin Hjelle, a claimant herein, a fact which did not escape the attention of the court below in affirming the one-half million dollar penalty assessed by the trial court.

assertion of jurisdiction here suffers from the same infirmity.

The Alaska Supreme Court's decisions also conflict with *United States v. Ray*, 423 F.2d 16 (5th Cir. 1970), which is discussed *infra* under the issues of federal exclusivity.

It should be emphasized that the area regulated by Alaska is not within the boundary of *any* state. As discussed *infra*, it is an area historically fished by foreign nations and subject to both national and international rights. The regulation of those rights is a function of national external sovereignty. Thus, the Commerce Clause considerations are even more important here.

> Foreign commerce is pre-eminently a matter of national concern. "In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and national power."

Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 448 (1979).

2. Regulation of Crab Is Exclusively Federal Under the Supremacy Clause.

The dissenting opinions of Justice Connor in this case, *State v. Sieminski*, 556 P.2d 929, 935 (Alaska 1976), and in *Bundrant* accepted the view that federal jurisdiction over king crab is exclusive, and that any state regulation is prohibited by the Supremacy Clause:

> The reason for federal pre-emption must be drawn from the rationale of the *First California* case, *supra* [United States v. California, 332 U.S. 19 (1947)]. The whole area of regulation of ocean floor resources is inextricably intertwined with international law and affairs.

546 P.2d 530. Justice Connor reasoned as follows:

> (1) State legislation is pre-empted by the OCSLA, 43 U.S.C. § 1332(a), as the crabs are legally a resource of

the ocean floor rather than of the water column above that floor.

(2) State legislation is pre-empted by the SLA, 43 U.S.C. § 1302, regardless of the characterization of the crab resource.

(3) Notwithstanding any of the above, foreign and military affairs are so inextricably intertwined with the regulation of high seas resources that, absent explicit congressional delegation to the state, the area is excluded from state regulation.

In the *First California* case, [*United States v. California*, 332 U.S. 19 (1947)], this Court held that: "The protection and control of [the marginal sea] has been and is a function of the national external sovereignty." 332 U.S. at 34. This principle was followed in *United States v. Louisiana*, 339 U.S. 699 (1950):

> As we pointed out in *United States v. California*, the issue in this class of litigation does not turn on title or ownership in the conventional sense. California, like the thirteen original colonies, never acquired ownership in the marginal sea. A claim to our three-mile belt was first asserted by the national government. Protection and control of the area are indeed functions of national external sovereignty. 332 U.S. pp. 31-34. The marginal sea is a national, not a state concern. National interests, national responsibilities, national concerns are involved. The problems of commerce, national defense, relations with other powers, war and peace focus there. National rights must therefore be paramount in that area.

339 U.S. at 704. This concept was recently reaffirmed by this Court in *United States v. Maine*, 420 U.S. 515 (1975), which relied on *United States v. Texas*,[6] *United States v. Louisiana*,[7] and *United States v. California* [*First California*][8] in holding that: "In external affairs the United States became the

6. 339 U.S. 707 (1950).
7. 339 U.S. 699 (1950).
8. 332 U.S. 19 (1947).

sole and exclusive spokesman of the nation." 420 U.S. 523. The *Maine* and *California* cases dealt with whether or not the federal government had exclusive jurisdiction over the natural resources of the seabed within the marginal sea. Only oil and gas were important there, but the concept discussed could apply equally to living sedentary species of the Shelf. In answer to the *First California* case, the Submerged Lands Act was passed to grant to the states limited dominion over the offshore seabed and its resources within the marginal sea. 43 U.S.C. §§ 1301-1315. However, as part of the Submerged Lands Act, an express congressional statement was made with regard to the resources lying seaward of the marginal sea. 43 U.S.C. § 1302 (1953) provides:

> Nothing in this chapter shall be deemed to affect in any wise the rights of the United States to the natural resources of that portion of the subsoil and seabed of the Continental Shelf lying seaward and outside of the area of lands beneath the navigable waters, as defined in section 1301 of this title, all of which natural resources appertain to the United States, and the jurisdiction and control of which by the United States is confirmed.

The Submerged Lands Act was passed in May 1953 and was managed by Senator Guy Cordon (Oregon). In analyzing the Submerged Lands Act, this Court placed reliance upon Senator Cordon's debates and his explanation of the Act before the Senate. *See United States v. California*, 381 U.S. 139, 150-163 (1965) (*Second California*). Later in that same year, in what was considered until its final passage as an amendment to the Submerged Lands Act,[9] Congress passed the Outer Continental Shelf Lands Act, on August 7, 1953. The Act specified that the jurisdiction of the United States is extended to the "subsoil and seab[illegible]" of the Outer Continental Shelf for the purpose of exploring for, develop-

9. H.R. Rep. 413, May 12, 1953.

ing and removing "resources therefrom to the same extent as if the Outer Continental Shelf were an area of exclusive federal jurisdiction." 43 U.S.C. § 1333(a)(1). Another section of the Act, § 1333(a)(2), provides that federal officers and courts may enforce on the Continental Shelf civil and criminal laws of each adjacent state; however, this was to "never be interpreted as the basis for claiming any interest in or jurisdiction on behalf of any state for any purpose over the seabed . . . or the property and natural resources thereof." 43 U.S.C. § 1333(a)(3). The legislative history shows that two attempts were made by states rights senators to amend the Act to permit concurrent jurisdiction to control the disposition of the natural resources. Both these attempts were defeated on the argument of Senator Cordon that, "With respect to the Outer Shelf lands, they are wholly outside the boundary of any state, and there is no jurisdiction on the part of any state." 1953 Congressional Record, Senate, pp. 7226-7232, 10472. Additionally, Senator Cordon indicated strong approval for the position of the Department of Justice that, "Particularly in view of the intermingling of national and international rights in the area, it is important that the federal government, which has the responsibility of foreign relations, have the exclusive control of law making and law enforcement there." 99 Cong. Rec. 6963 (1953).

The *Bundrant* decision and the opinion in this case are in conflict with *United States v. Ray*, 423 F.2d 16 (5th Cir. 1970), which the Alaska Supreme Court described as "troublesome." 546 P.2d 530. Ray held that coral reefs more than three miles off the coast of Florida "are 'natural' resources within the Outer Continental Shelf Lands Act," 423 F.2d 16, 19. The court also held that the Geneva Convention on the Continental Shelf confirmed and crystallized the ex-

clusive federal rights. 423 F.2d 16, 21. The natural resources referred to in the Convention include "living organisms belonging to sedentary species, that is to say organisms which at the harvestable stage, either are immobile or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil." (¶ 3, Art. 2.) King crab like coral has been defined by federal law as one of the sedentary species, is a living resource of the shelf and is not subject to Alaska regulation.[10]

3. The Regulations Sought To Be Enforced Are Void For Vagueness.

The Alaska regulations are impermissibly vague and their enforcement against the AMERICAN EAGLE denies claimants due process of law.

The seizure of the AMERICAN EAGLE took place before the Alaska Supreme Court's decision in *State v. Bundrant, supra,* which for the first time provided support for an assertion of jurisdiction by Alaska beyond three miles from shore. Up to that time, the courts that had considered the issue had held that Alaska's regulations could not be applied beyond her territorial waters. In *Hjelle v. Brooks, supra,* 377 F. Supp. 430, the United States District Court for Alaska had enjoined the enforcement of regulations applicable on their face beyond the three-mile limit. In response to that decision, Alaska adopted new regulations—which are at issue here—that did not facially assert jurisdiction outside of the waters of Alaska. In *State v. Uri* [*Uri I*] (Appendix L),

10. Under the Bartlett Act, 16 U.S.C. § 1085, king crab were expressly claimed by federal law as a sedentary species. That act was replaced in 1977 by 16 U.S.C. § 1802(4) which sustains that claim. Justice Connor of the Alaska Supreme Court would include scallops as a shelf resource even though not named as such by federal law. *State v. Sieminski,* 556 P.2d 929, (Alas. 1976).

Justice Burke of the Alaska Supreme Court, then sitting as a superior court judge, held that any attempt to apply those new regulations more than three miles from shore would be in conflict with an area of exclusive federal jurisdiction. It was Judge Burke's decision in *Uri I* that was overturned in the consolidated case of *State v. Bundrant* and *State v. Uri, supra,* 546 P.2d 530.

The state of the law at the time the AMERICAN EAGLE was seized is characterized in the opinion below as "unsettled," 620 P.2d 657, 672, Appendix A at 56. The existing case law held Alaska regulations could not be applied beyond three miles, and the regulations themselves gave no notice on their face that they were intended to be applied beyond three miles from shore.

The post-*Hjelle v. Brooks* regulations enforced in this case set up a series of statistical areas. Under 5 AAC 34.005:

> (b) Each statistical area consists of:
>
> (1) a *registration area,* comprised of all the waters within the statistical area which are *waters subject to the jurisdiction of the state;* and
>
> (2) *an adjacent seaward biological influence zone,* comprised of all the waters within the statistical area which are not part of the registration area.
>
> (c) *Registration areas are areas in which the department shall apply* conservation and management *regulations* in order to protect and maintain the king crab resources of the state.
>
> (d) *Adjacent seaward biological influence zones* are areas which the department shall utilize to *obtain* biological and fishing effort *data* and other information necessary for the formulation of comprehensive and effective conservation and management regulations governing king crab resources inhabiting waters subject to the jurisdiction of the state.

(Emphasis added.) Thus, it was clear that only "registration

areas" were subject to regulation or closure.[11] The present dispute arose because there was no definition of the outer boundary of a registration area; the registration areas were merely described as "waters subject to the jurisdiction of the state."[12] The Alaska Supreme Court, in its opinion below, acknowledged the ambiguities in the regulations. "Some ambiguity did exist in the applicable regulations, as a result of conflict over the extent of the state's jurisdictional powers." (Citing *Hjelle v. Brooks, supra*, 620 P.2d 657, 663.) After reviewing the regulations, the court noted:

> Thus, the *seaward boundary of the area in which the state intended to enforce its regulations within each statistical area was left unspecified.* The intent, according to the state, was for the boundary to extend as far beyond the three-mile limit as state jurisdiction could be justified in a trial on the merits under the *Hjelle* criteria.

620 P.2d 657, 644 (emphasis added). The Alaska Commissioner of Fish and Game, James Brooks, who adopted the regulations, testified that the registration area was "a geographical area without a precisely defined outer limit" and that the boundary was intended to move with crab migration. R. 166-7, 174-5.[13]

As noted by the Alaska court, the ambiguity in the regula-

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11. 5 AAC 34.035 and .610 also confirmed that only registration areas were subject to closure. *See* Appendix I.

12. The only place where any definition coming close to "waters subject to the jurisdiction of the state" could be found was in 5 AAC 39.975(13), which provided: " '*waters of Alaska*' means the waters north and west of the International Boundary at Dixon Entrance including those extending *three miles seaward* (a) *from the coast*; . . ." (Emphasis added.) The corollary for this regulation is 5 AAC 36.010 which provides: "The *International Water* area included *all waters waters outside Alaska's three-mile limit, i.e.*, beyond those described in 5 AAC 39.975(13)." (Emphasis added.)

13. The confusion by Alaska also extended to the Attorney General's office. In its brief to the Superior Court in *Uri*, the State suggested that the boundaries moved with the migration of the crab. R. 84.

tions was not an oversight. 620 P.2d at 664 (quoted above). The State wished to avoid another injunction by the federal court in the *Hjelle* litigation and was unwilling to make a clear assertion of jurisdiction beyond three miles from shore without some new support from the courts. In *Bundrant*, the Alaska Supreme Court provided that support. In addition, following remand of *Bundrant* and *Uri*, the superior court issued two decisions concerning the vagueness of the regulations. The superior court held, in *Uri III*, that the terms "registration area" and "statistical area" were not synonymous. As to offenses alleged to have occurred more than three miles from shore, the court stated:

> I further find that 5 AAC 34.035 governs the opening and closing of fishing seasons in Registration Areas only, not in statistical areas; therefore Registration Areas should be specifically described or 5 AAC 34.035 should be amended to apply to the opening and closing of seasons in "Statistical Area."

Memorandum of Decision and Order of Dismissal, p. 4 (Appendix G).

Uri III was followed by *State v. The F/V Quinhagak* (Appendix H), which also held the regulations void for vagueness. The State did not appeal from either decision. Instead, it amended its regulations to remove the ambiguity about where they applied.[14]

The present regulations are set forth in Appendix K, together with the prior regulations which are at issue in this case. Their comparison illustrates the defect in the regulations at issue and the case of cure once the state decided to

14. The regulations in *Uri* involved the Bering Sea, while the regulations here involve the North Pacific Ocean. In *Uri*, the "statistical area" was all waters of the Bering Sea; here, the statistical area extended to the 800 fathom curve. However, the regulations were identical in leaving the boundary for the "registration area" unspecified.

give clear notice of its intentions.[15] The State's effort to shift the burden of guessing about the limits of its maximum jurisdictional reach under the regulations at issue was impermissible and renders those regulations void for vagueness.

Regulations controlling the Alaska crab fishery must be sufficiently definite so that crab fishermen can tell when they are violating the regulations and when they are not. Courts have repeatedly required that criminal laws be defined with particular clarity under the realistic belief that people should not be required to pay penalties for violating laws they cannot understand. As this Court said in *Lanzetta v. New Jersey*, 306 U.S. 451 (1939):

> No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. The applicable rule is stated in *Connally v. General Const. Co.*, 269 U.S. 385, 391, 70 L. Ed. 332, 328, 46 S. Ct. 126: "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

At the time the AMERICAN EAGLE was seized, all existing

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15. The present version of 5 AAC 34.005 confirms that a registration area is comprised of the territorial waters of Alaska—the only reasonable definition of "registration area" under either version of the regulations. But the present regulations also state unequivocally at several places that regulations and closure orders now apply throughout the statistical areas, in both registration areas and seaward biological influence zones. 5 AAC 34.005(d); .010; .035(f); .091. That was not the case under the regulations in issue.

case law held that Alaska could not regulate outside its territorial waters, and a reading of Alaska's regulations gave no notice that it intended to do so.

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide the explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Grayned v. City of Rockford, 408 U.S. 104 (1972). The lack of specificity in the regulations at issue was intentional and impermissible.

The Alaska Supreme Court, while acknowledging that "the ambiguity in the language is evident," 620 P.2d 657, 664, held that such ambiguity was cured by the action of a field biologist when he issued an emergency order closing a district with an outer boundary coinciding with the statistical area boundary or the 800 fathom curve.[16] However, the activities proscribed by regulation, and in turn made illegal by Alaska statute,[17] were limited to transporting crab in a closed *registration area* by a vessel registered for that area but not validly registered for another *registration area* for

16. The Egg Island District was defined by 5 AAC 34.605(c) as being a portion of Statistical Area O, with definite east, west, south, and north boundaries. The south boundary was the same as that for the statistical area or 800 fathom curve. That curve is approximately 30 miles offshore.

17. AS 16.10.200.

which the season is open;[18] possession of unprocessed crab *within a registration area* unless the vessel is validly registered for the area and the season is open;[19] or possession aboard a vessel licensed as a commercial fishing vessel *within any registration area* any crab or any gear used in the taking of crab which are prohibited by other regulations in the chapter governing such *registration area*.[20] Indeed, the regulations began by announcing that only within the registration area is the state to apply conservation and management regulations.[21] The field biologist could have purported to "close" the entire North Pacific Ocean, but his order did not change what Alaska had previously published as the maximum extent of its geographic legal jurisdiction. Thus, the regulations, even with the emergency order, were still fatally defective for vagueness, because the biologist still did not provide the essential element: the boundary for the *registration area*.[21A]

4. The Alaska In Rem Forfeiture Procedure Lacks Due Process Requirements.

There is no procedure in Alaska for in rem civil forfeiture cases. Nor is there any procedure for a prompt post-seizure hearing, bonding, or remission. The entire civil procedure is tersely stated in Alaska Statute 16.05.195 that a vessel and its catch may be forfeited to the state "(2) upon judgment of a court of competent jurisdiction in a proceeding in rem."

18. 5 ACC 34.035(e)(1).

19. 5 ACC 34.090(a).

20. 5 ACC 34.090(b).

21. 5 AAC 34.005(c).

21A. Alaska's crab regulations were amended after the superior court decisions in *Uri III* and *Quinhagak*, *supra*, 5 AAC 34.005(b)(1), to expressly limit the registration area to the three mile limit. The regulation now provides that a registration area is "comprised of all the waters within the statistical area which are territorial waters of Alaska." See App. K.

The court below recognized the seriousness of this question in stating:

> The owners of the AMERICAN EAGLE also complain they were denied due process of law in that the forfeiture statutes under which the vessel, gear, and sale proceeds were seized provide for no in rem procedure or prompt post seizure notice and hearing. *Given this broad deficiency, the owners, in our opinion, have raised a substantial question of whether the* statutory scheme on its face affords adequate procedural due process.

620 P.2d 657, 666, Appendix A at 32. (Emphasis added.)

The court went on to acknowledge:

> [W]hen the seized property is used by its owner in earning a livelihood, notice and an unconditioned opportunity to contest *the state's reasons for seizing the property must follow the seizure within days, if not hours,* to satisfy due process guarantees even where the government interest in the seizure is urgent. *Stypmann v. City and County of San Francisco,* 557 F.2d 1338 (9th Cir. 1977); *Lee v. Thorton,* 538 F.2d (2d Cir. 1976).

(Emphasis added.) 620 P.2d at 666-67, Appendix A at 33. These principles are in clear accord with *Barry v. Barchi,* 443 U.S. 55 (1979), where this Court held that a license suspension procedure lacked due process for failure to provide a *prompt* post-suspension hearing.

The Alaska Supreme Court then went on to state that procedural due process had been provided because (1) Alaska Criminal Rule 37(c) provided a method for filing a motion to suppress evidence illegally seized and to obtain its return, and (2) that claimants were in fact provided with procedural due process.

It is clear that there was no prompt post-seizure hearing required under Alaska law and none provided. Alaska Crim-

inal Rule 37(c) expressly does not apply to a civil in rem proceeding.[22] It was not even mentioned in these proceedings as providing the necessary post seizure hearing until the State filed its brief on appeal. It does not require the State to initiate judicial proceedings within a prompt period of time or even within a particular area.

The Washington Supreme Court has uniformly held that a prompt hearing must be provided by statute and that a trial even five weeks after seizure is inadequate. *State v. One 1972 Mercury Capri*, 85 Wn.2d 620, 537 P.2d 763 (1975); *State v. Matheson*, 84 Wn.2d 130, 524 P.2d 388 (1974); *Everett v. Slade*, 83 Wn.2d 80, 515 P.2d 1295 (Wash. 1973). Both South Dakota, in *State v. Miller*, 248 N.W.2d 377 (S.D. 1976), and California, in *People v. Broad*, 12 P.2d 941 (Cal. 1932), hold in accord that the statutes or rules themselves must provide for hearing. *Sensenbrenner v. Crosby*, 306 N.E.2d 413 (Ohio 1974), seems alone in its position that the civil rules provide adequate due process for forfeiture cases. No case, however, supports the view that a criminal rule can be relied upon to provide adequate due process in a subsequently filed civil forfeiture case.

The facts, even as perceived by the Alaska court, show that claimants did not receive the minimum protections required by due process. The AMERICAN EAGLE was seized on January 15, 1976. No complaint was filed for thirteen days, and then the action was brought over 600 miles away from the port of seizure. No procedure for posting bond existed and claimants were compelled to accept the State's assessment of value, which they disputed, in order to obtain the re-

22. Alaska Court Criminal Rule 1. "*Scope*. These rules govern the practice and procedure in the superior court in all criminal proceedings." Appendix I.

lease of their vessel by stipulation, note, and mortage. R. 757-63. Agreement on a stipulation was not reached until February 10, 1976 (R. 775), so the AMERICAN EAGLE was detained for almost four weeks without hearing. These facts contrast strikingly with the requirement of due process, acknowledged by the Alaska Supreme Court, that where the seized property is used by its owner in earning a livelihood, a prompt post-seizure hearing should be provided "within days, if not hours." 620 P.2d at 666-667.

In fact, no hearing in this civil proceeding was held until trial. Trial was first scheduled to begin in March 1977, over a year after the seizure. Claimants appeared prepared for trial but, over their strenuous objection, the case was continued until July 1977 at the State's request, because the State was unprepared. (Tr. 83.) Of course, if the Alaska Criminal Rules had been applicable, Criminal Rule 45 would have required a trial within 120 days of arrest or filing the complaint. (Appendix I.)

As stated, claimants were deprived of their vessel for almost four weeks before agreement on a bond could be obtained. "But it is now well settled that a temporary, nonfinal deprivation of property is nonetheless a 'deprivation' in the terms of the Fourteenth Amendment. *Sniadach v. Family Finance Corp.*, 395 U.S. 337." *Fuentes v. Shevin*, 407 U.S. 67, 84-85 (1972). Deprivation of property used by persons to earn their livelihood for any period of time is a substantial deprivation.

Even after release, the AMERICAN EAGLE had to be operated with the additional encumbrance of a second mortgage. Claimants have also been deprived of the proceeds of the catch since the date of seizure. The tying up of funds

alone constitutes irreparable injury. *Commissioner v. Shapiro*, 424 U.S. 614 (1976).

While the integrity of the bond posted was eventually upheld by the Alaska courts, the State of Alaska attempted to renege on its stipulation and reseize the AMERICAN EAGLE after the trial court's initial decision and while this case was still pending. (R. 582, 689, 724.)

The confusion which caused this misdirected state action resulted directly from the lack of any due process procedure under Alaska law, and again unfairly worked to the detriment of the vessel owners rather than the state, which had erred in its understanding of the law by attempting a second seizure. Both the trial court[23] and the Alaska attorney general[24] admitted confusion because of lack of guidance under Alaska law once the bond had been posted.

The court below held that there was no absolute right to a hearing for the purpose of setting a bond or on the question of remission because the two shoreside owners, who were over a thousand miles from the scene and had no knowledge of the charged offenses, were not completely innocent third parties. 620 P.2d at 688, Appendix A at 38-39. The basis for their finding of complicity is that: (1) the shoreside owners, Hansen and Hjelle, shared in the profits of the vessel; (2) Hjelle filed a civil suit in federal court challenging Alaska's jurisdiction outside its territorial waters; and (3) Hansen did the bookkeeping.

There is substantial federal authority holding that a pro-

23. "[T]he statutes of this State and rules of this Court *do not set forth any* procedure to guide this Court or the parties on how a forfeiture is to be carried out. . . ." (R. 733-34, emphasis added.)

24. "The lack of statutory guidance and judicial interpretation on vessel forfeiture in Alaska appear primarily responsible for the superior court's equivocal posture regarding forfeiture." (State Brief, p. 16).

cedure for remission must be available.[25] In a recent decision, the Alaska Supreme Court, in *State v. Rice*, slip op. No. 2321, Apr. 10, 1981, Appendix M at A-202, held that a remission procedure is constitutionally required to afford innocent owners due process of law. (Opinion p. 26.) No such procedure existed at the time the AMERICAN EAGLE case was tried. Rather than considering the applicability of a remission hearing, the court below summarily determined that because claimants Hjelle and Hansen were partners in a lawful fishing venture and would have shared in the profits of the lawful activity, they could not be considered to be truly innocent. Such a finding of guilt by association is constitutionally impermissible. *E.g., Scales v. United States*, 367 U.S. 203 (1961).

Vessel seizures are now a common enforcement measure employed by the State of Alaska. No other case involving these Alaska statutes has ever been tried on the merits. Fishing seasons are short, and loss of use of a vessel for even a few days can mean economic disaster. Bonds may be obtained, if at all, only on the State's own terms. The State of Alaska is in a position to utilize the economic duress inherent in that situation.[26]

The consequences of even a temporary seizure are severe and the absence of a procedure for civil forfeiture cases in Alaska cannot be supported by any state interest. *Barry v. Barchi*, 443 U.S. 55, 66 (1979).

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25. *United States v. One (1) Mercury Cougar*, 397 F.Supp. 1325 (C.D. Cal. 1975); *United States v. One (1) Chevrolet Blazer*, 563 F.2d 1386 (9th Cir. 1977); *United States v. Eight (8) Rhodesian Stone Statues*, 449 F. Supp. 193 (C.D. Cal. 1978); *United States v. One (1) Douglas A-26B Aircraft*, 436 F. Supp. 1292 (S.D. Ga. 1977).

26. To increase its leverage, the State of Alaska routinely refuses to negotiate a bond or demands a bond at an unrealistic level, often twice the value of the vessel. (Affidavits of Douglas M. Fryer and William B. Rozell in Support of Petition for Rehearing.)

CONCLUSION

For the foregoing reasons, claimants are entitled to a summary reversal of the decision of the Alaska Supreme Court. Failing summary action, the jurisdiction of the Court is manifest, *Japan Line Ltd. v. County of Los Angeles, supra,* 441 U.S. 434, 440. Therefore, claimants petition the Court to allow submission of briefs on the merits and to present oral argument for their resolution.

DATED: May 29, 1981.

Respectfully submitted,

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APPENDIX A

THE SUPREME COURT OF THE STATE OF ALASKA

THE F/V AMERICAN EAGLE, ADF&G NO. 39 and $100,677.50 REPRESENTING THE PROCEEDS OF 143,825 lbs. OF ALASKA KING CRAB DELIVERED PURSUANT TO ADF&G FISH TICKET NO.'S E95626, E95627, Appellant, v. STATE OF ALASKA, Appellee,	File No. 3973 OPINION [No. 2227 - November 21, 1980]
STATE OF ALASKA, Appellant, Cross-Appellee, v. THE F/V AMERICAN EAGLE, ADF&G NO. 39 and $100,677.50 REPRESENTING THE PROCEEDS OF 143,825 lbs. OF ALASKA KING CRAB DELIVERED PURSUANT TO ADF&G FISH TICKET NO.'S E95626, E95627, Appellant, Cross-Appellant.	File Nos. 3974/4023

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Kodiak,
Roy H. Madsen, Judge.

Appearances: Douglas M. Fryer, Moriarty, Mikkelborg, Broz, Wells & Fryer, Seattle, William B. Rozell, Faulkner, Banfield, Doogan & Holmes, Juneau, for

Appellant, Cross-Appellee. John G. Gissberg, Assistant Attorney General, Anchorage, Avrum M. Gross, Attorney General, Juneau, for Appellee, Cross-Appellant.

Before: Rabinowitz, Chief Justice, Connor, Burke and Matthews, Justices, and Stewart, Superior Court Judge. [Boochever, Justice, not participating.]

RABINOWITZ, Chief Justice.
CONNOR, Justice, dissenting.

This case involves an in rem civil forfeiture proceeding brought for alleged violations of Alaska's laws regulating this state's important king crab fishery. On January 15, 1976, the fishing vessel American Eagle was seized by state officials while it was unloading crab in Pelican, Alaska. The seizure was pursuant to AS 16.05.190-.195,[1] for violating various

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[1] AS 16.05.190 provides:

Seizure without warrant and confiscation by court. Guns, traps, nets, fishing tackle, boats, aircraft, automobiles or other vehicles, sleds, and other paraphernalia used in or in aid of a violation of

(footnote 1 continued)

this chapter, or rule or regulation of the department may be seized under a valid search, or all fish and game, or parts of fish and game, or nests or eggs of birds, taken, transported, or possessed contrary to the provisions of this chapter, or rule or regulation of the department shall be seized by any persons designated in § 150 of this chapter. Upon conviction of the offender or upon judgment of the court having jurisdiction that the item was taken, transported, or possessed in violation of this chapter or rule or regulation of the department, all fish and game, or parts of them are forfeited to the state and shall be disposed of as directed by the court. If sold, the proceeds of the sale shall be transmitted to the proper state officer for deposit in the general fund. Guns, traps, nets, fishing tackle, boats, aircraft, or other vehicles, sleds, or other paraphernalia seized under the provisions of this chapter, or rule or regulation of the department, unless forfeited by order of the court, shall be returned, after completion of the case and payment of the fine, if any.

AS 16.05.195 provides in pertinent part:

Forfeiture of equipment: (a) Guns, traps, nets, fishing gear, vessels, aircraft, other motor vehicles, sleds, and other paraphernalia or gear used in or in aid of a violation of this title, or regulation promulgated under this title, and all fish and game or parts of fish and game or nests or eggs of birds, taken, transported or possessed contrary to the provisions of this title, or regulation

regulations prohibiting the taking and possession, during closed season, of king crab from the Egg Island district of king crab statistical area "O" in the Aleutian Islands. The vessel's on-board gear and

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(footnote 1 continued)

promulgated under it, may be forfeited to the state

(1) upon conviction of the offender in a criminal proceeding of a violation of this title in a court of competent jurisdiction; or

(2) upon judgment of a court of competent jurisdiction in a proceeding in rem that an item specified above was used in or in aid of a violation of this title or a regulation promulgated under it.

(b) Items specified in (a) of this section may be forfeited under this forfeiture action.

(c) An action for forfeiture under this section may be joined with an alternative action for damages brought by the state to recover damages for the value of fish and game or parts of them or nests or eggs of birds taken, transported or possessed contrary to the provisions of this title or a regulation promulgated under it.

(d) It is no defense that the person who had the item specified in (a) of this section in possession at the time of its use and seizure has not been convicted or acquitted in a criminal proceeding resulting from or arising out of its use.

proceeds equal to $100,677.50 from the sale of crab were also seized. The state subsequently filed a complaint for forfeiture which in its final amended form alleged the following specific violations: taking or possessing king crab out of season as defined by 5 AAC 34.610[2] and Westward Region Emergency Shellfish Orders No. 20 and 23,[3] and prohibited by

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[2] 5ACC 34.610 provides:

FISHING SEASONS. King crab may be taken as follows:

(1) from 12:00 noon September 10 through February 15 unless closed earlier by emergency order, king crab six and one-half inches (165mm) or greater in width of shell may be taken or possessed;

(2) during periods to be opened and closed by emergency order, king crab seven and one-half inches (191mm) or greater in width of shell may be taken or possessed.

[3] Westward Region Emergency Shellfish Order No. 20, dated November 4, 1975, reads in pertinent part:

> The present level of catch and rate of fishing success indicate that the desired king crab catch for the Egg

(Footnote 3 continued)

Island district of statistical area O will be attained by 12:00 noon November 7.

The same analysis of data for the Bering Sea (statistical area O king crab fishery indicates that the desired harvest of red king crab will be attained by 12:00 noon November 14.

Therefore, the Egg Island district of area O will close to king crab fishing after 12:00 noon November 7 and the Bering Sea will close to fishing for red king crab after 12:00 noon November 14.

Westward Region Emergency Shellfish Order No. 23, dated November 18, 1975, reads in part:

EMERGENCY ORDER:

5 AAC 34.610. FISHING SEASONS. and 5 AAC 34.635. CLOSED WATERS. and 5 AAC 34.535 CLOSED WATERS. shall be amended to read as follows:

5 AAC 34.610. FISHING SEASONS. King crab may be taken or possessed from 12:00 noon November 1 through February 15 unless the registration area is closed earlier by emergency order.

5 AAC 34.635. CLOSED WATERS. King crab fishing is prohibited:

(a) after 12:00 noon November 7 in the Egg Island district . . . .

5 ACC 34.098,[4] 5 AAC 34.090(a)[5] and AS 16.10.200[6] on or about January 7, 1976, and taking or possessing king crab out of

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[4] 5 AAC 34.098 provides:

> VIOLATION OF REGULATIONS. It is unlawful for any person to violate any of the regulations of this chapter.

[5] 5 AAC 34.090(a) provides:

> UNLAWFUL POSSESSION OF KING CRAB OR KING CRAB GEAR. (a) it is unlawful for any person to possess unprocessed king crab aboard a vessel licensed as a commercial fishing vessel within any registration area unless the vessel is validly registered for the area and the season is open, or unless the person is acting pursuant to the authorization of sec. 30(d), sec. 33, or sec. 35(e) of this chapter.

[6] AS 16.10.200 provides:

> Unlawful taking prohibited. It is unlawful for a person taking migratory fish and migratory shellfish in high sea areas designated by the Board of Fisheries or in violation of the regulations promulgated by the Board of Fisheries governing the taking of migratory fish and migratory shellfish in the designated areas to possess, sell, offer to sell, barter, offer to barter, give or transport in the state, including the waters of the state, migratory fish or migratory shellfish.

season in violation of 5 AAC 34.090(c),[7] and AS 16.10.210.[8] The vessel was later released for local fishing pursuant to a stipulated order of the parties dated February 10, 1976, in exchange for the posting of a bond by the owners in the amount of $350,000. Trial in this matter

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[7] 5 AAC 34.090(c) provides:

> (c) It is unlawful for any person to possess, purchase, sell, barter, or transport king crab within the state or within water subject to the jurisdiction of the state if that person knows or has reason to know that such king crab were taken or possessed in contravention of the regulations of this chapter.

[8] AS 16.10.210 provides:

> Unlawful sale or offer prohibited. It is unlawful for a person to possess, purchase, offer to purchase, sell, or offer to sell in the state migratory fish or migratory shellfish taken on the high seas knowing that they were taken in violation of a regulation promulgated by the Board of Fisheries governing the taking of migratory fish or migratory shellfish in certain areas designated by the Board of Fisheries or the commissioner.

was held in the superior court at Kodiak. The court's final order directed forfeiture of the crab sale proceeds and the bond posted for the release of the vessel.

This appeal has been brought by the owners of the vessel, Harold Hansen, Severin Hjelle, and Reidar Tynes, all residents of Washington. The owners allege (1) the state had no jurisdiction to regulate the fishing activities of the vessel beyond the three-mile Alaska territorial waters limit; (2) the reulations which the vessel was alleged to have violated are unconstitutionally vague; (3) the absence of an in rem procedure and a prompt post-service hearing denied the owners due process of law; (4) the trial court erred in admitting statistical evidence relating to crab migration and size; and (5) the trial court erred in awarding attorney's fees to the state.

The state has brought a cross-appeal, alleging that the trial court erred in allowing the owners of the vessel to substitute the $350,000 bond in lieu of forfeiting the vessel. We find no merit in either appeal, and affirm the lower court's ruling.

1. Jurisdiction over the vessel's fishing activities in waters beyond Alaska's three-mile territorial limit.

There is some dispute over whether the American Eagle was operating within or beyond the three-mile territorial limit of state waters when the regulations were allegedly violated.[9] However, assuming

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[9] Testimony at trial showed that on January 2 and January 5 witnesses saw the F/V American Eagle fishing within the closed Egg Island district of king crab statistical area O. On January 7, 1976, Fish and Wildlife officers chartered a vessel and proceeded to the Egg Island district. There they found eight sets of buoys identified as from the F/V American Eagle. One of these pots was pulled. It was baited and contained crabs. On January 16,

(footnote 9 continued)

27 buoys and traps belonging to the vessel were identified south of Akutan Island in the Egg Island district, seven of which matched numbers of the buoys found on January 7. Alaska's territorial waters are defined in 5 AAC 39.975(13):

> (13) "waters of Alaska" means the waters north and west of the International Boundary at Dixon Entrance including those extending three miles seaward
>
> (A) from the coast;
> (B) from lines extending from headland to headland across all bays, inlets, straits, passes, sounds and entrances;
> (C) from an island or group of islands, including the islands of the Alexander Archipelago, and the waters between the groups of islands and the mainland.

The state, relying on an exhibit in the form of a map which depicts roughly the activity of the American Eagle within the Egg Island district during the 1975-76 season and the location of the buoys, maintains that the violations alleged occurred within three miles of lines extending between headlands or within three miles of groups of islands in the district. However, a state protection officer testified that the pots were found within a circle six and one half miles in diameter, and the state at trial did not attempt to show the location of the alleged violations with more specificity.

the operations were beyone the three-mile limit, we conclude that the state possesses valid authority to regulate crab fishing in these waters. This precise question was decided in State v. Bundrant, 546 P.2d 530 (Alaska), appeal dismissed sub nom. Uri v. State, 429 U.S. 806, 50 L. Ed. 2d 66 (1976), a decision published one week after the American Eagle allegedly violated the law. In Bundrant we upheld the state's exercise of regulatory jurisdiction over crab fisheries beyone the three-mile limit against arguments based on federal exclusivity, preemption, and other doctrines.[10]

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[10] After our decision in Bundrant v. State, 546 P.2d 530 (Alaska 1976), Congress enacted the Fishery Conservation and Management Act of 1976 (FCMA), which provides for federal fisheries management in areas seaward of Alaska's three-mile maritime boundary to a distance of 200 miles. Pub. L. No. 94-265, 90 Stat. 331 (1976), as amended, codified at 16 U.S.C.A. §§ 1801-82 (West, 1979 Supp.). To the extent that there may be a conflict between state fisheries regulations and federal regulations promulgated under the Act,

This power to regulate beyond the territorial boundary, where the crab spend much of their life cycle, was shown in that case to be clearly necessary if the economically and ecologically important migratory crab population within the state's territorial boundary is to be perpetuated. 546 P.2d at 557.[11] Although some of the specific

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(footnote 10 continued)

Alaska's authority to regulate fisheries under Bundrant has been superseded. See 16 U.S.C.A. § 1856 (West, 1979 Supp.) (delineating federal and state jurisdiction in this area). Nevertheless, the events in this case arose prior to the March 1, 1977, effective date of the FCMA and there were no federal regulations applicable to the taking of king crab by domestic vessels in effect at the time. Consequently, we have relied on Bundrant.

[11] The California Supreme Court in People v. Weeren, 607 P.2d 1279 (Cal. 1980), petition for cert. filed, 49 U.S.L.W. 3044 (June 16, 1980), (No. 79-1978), found penal jurisdiction over defendants charged with fishing illegally when the commission of the charged offense occurred outside of California's territorial waters:

> The United States Supreme Court has held that in matters affecting its

(footnote 11 continued)

> legitimate interests a state may regulate the conduct of its citizens upon the high seas where no conflict with federal law is presented. More specifically, the court recognized that a state's interests in preserving nearby fisheries is sufficiently strong to permit such extraterritorial enforcement of its laws enacted for that purpose.
>
> It seem obvious that by adoption and enforcement of its control regulations California seeks to prevent the depletion of a very valuable natural resource. Fish swim. By their very nature they move freely across those arbitrary boundaries which are enacted by governmental entities for official purposes. The commercial and recreational value of California's fisheries are self-evident and are developed, both quantitatively and in their financial aspects, in the record before us. We have no difficulty in discerning in the preservation of its valuable fish population the requisite state interest for extraterritorial enforcement. Furthermore, the state laws here at issue present no conflict with federal swordfish policies because no federal rules in that field have as yet been promulgated under the FCMA.

Id. at 1285-86 (citations omitted).

statutes and regulations questioned in this case differ from those discussed in Bundrant, both cases involve challenges by fishermen who reside in another state to Alaska laws which prohibit the taking or possession of king crab outside the territorial limit of state waters, or the subsequent transport and sale of crab within Alaska waters.[12] We therefore reaffirm Bundrant, as applied to this case.

II. Unconstitutional vagueness of the regulations applied to the F/V American Eagle.

A statute of regulation is impermissibly vague when the "language is so indefinite that the perimeters of the prohibited zone of conduct are unclear," violating rights to due process because the law fails to give adequate notice of

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[12] See notes 2 through 8 supra and State v. Bundrant, 546 P.2d 530, 535 (Alaska 1976).

what type of conduct is prohibited. Marks v. City of Anchorage, 500 P.2d 644, 646 (Alaska 1972). The owners of the American Eagle argue that the regulations which the vessel was accused of violating are unconstitutionally vague because they fail to identify with certainty the area subject to regulation by the state which was closed to king crab fishing at the time of the alleged violations.

Some ambiguity did exist in the applicable regulations, as a result of conflict over the extent of the state's jurisdictional power. In 1968 the Alaska Board of Fish and Game had adopted 5 AAC 36.040, making it unlawful to transport, possess, buy or sell any king crab "taken in violation of the rules and regulations promulgated by the board," if such crab was taken "in any waters seaward of that officially designated as the territorial waters of Alaska . . . ." Hjelle v.

Brooks, 377 F. Supp. 430, 433 (D.C. Alaska 1974); State v. Bundrant, 546 P.2d 530, 533 (Alaska 1976). In 1974, crab fisherman were successful in obtaining a preliminary injunction against the enforcement of this regulation from the federal district court in Alaska. The three-judge panel held that the evidence before the court at that time did not prove a sufficient basis for an extraterritorial regulation applicable only to crab taken beyond the three-mile limit, but confirmed that Alaska could regulate king crab fishing beyond the three-mile boundary if regulations related to a "nexus between its legitimate state interests and its regulation of certain extraterritorial conduct," Hjelle v. Brooks, 377 F. Supp. at 441.[13]

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[13] This language is contained in Judge Wright's majority opinion. Judge Plummer's concurring opinion emphasized that the state bears the burden of proof to establish a nexus for regulating the activity.

In conformity with this decision, the state amended its king crab regulations to the form in existence at the time of the American Eagle's alleged violations. These regulations established statistical areas, each consisting of a "registration area" where state conservation laws would be enforced "to protect and maintain the king crab resources of the state," 5 AAC 34. 005(c) and an adjacent "seaward biological influence zone" where the state would collect information for the development of protective regulations to govern "king crab resources inhabitating waters subject to

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(footnote 13 continued)

377 F. Supp. at 442. Judge Von der Heydt dissented, stating that the evidence before the court was too conflicting to conclude that the plaintiffs were reasonably certain to prevail against Alaska's assertions of an ultimate state interest in regulating crab fishing beyond the territorial limit, and further stating that evidence of the effect of extra-territorial fishing on the crab population and local industry should be considered in assessing the validity of the regulation.

the jurisdiction of the state." 5 AAC 34.005(d). The registration area was defined as "comprised of all waters within the statistical area which are waters subject to the jurisdiction of the state," while the seaward biological influence zone was described as "all waters within the statistical area which are not part of the registration area." 5 AAC 34.005(b). The geographic boundaries of statistical area O, were defined exactly in 5 AAC 34.600. The seaward boundary was designated as the 800-fathom depth contour.[14] The Egg

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[14] 5 AAC 34.600 reads:

Description of Statistical Area.

> Statistical area O has as its eastern boundary the longitude of Scotch Cap light, and as its western boundary 172 degrees W. long., and its seaward boundaries the 800-fathom depth contour, excluding the waters of statistical area Q.

Island district of statistical area O, in which the alleged violations occurred, had its exact boundaries described in 5 AAC 34.605(c).[15] However, nowhere in the regulations was the boundary, if any was intended to exist, between the registration area of statistical area O and the seaward biological influence zone of the same area delineated.

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[15] 5 AAC 34.605(c) states in full:

. . . .

(c) Egg Island district: all Pacific Ocean waters of statistical area O east of the longtitude of Udagak Strait on Unalaska Island (166 degrees 15 minutes W. long.), south of a line from Erskine Point on Unalaksa Is. (53 degrees 59 minutes N. Lat., 166 degrees 16 minutes 45 seconds W. long.) to Jackass Point on Akun Island (54 degrees 06 minutes 35 seconds N. lat., 165 degrees 34 minutes W. long.) then to Avatanak Point (54 degrees 02 minutes 30 seconds N. lat., 165 degrees 17 minutes W. long.), and west of the longitude of Avatanak Point (165 degrees 17 minutes W. Long.) including the waters of Beaver Inlet and Udagak Strait.

Thus, the seaward boundary of the area in which the state intended to enforce its regulations within each statistical area was left unspecified. The intent, according to the state, was for the boundary to extend within the statistical area as far beyond the three-mile limit as state jurisdiction could be justified in a trial on the merits under the Hjelle criteria. The vessel owners argue on the other hand that the only reasonable interpretation of the regulations is that the state intended to regulate only to the three-mile limit, in response to the Hjelle decision. If this was the intention, a phrase such as "territorial waters of Alaska" employed in the pre-Hjelle and post-Bundrant regulations or "waters of Alaska," which defines the state's territorial waters in 5 AAC 39.975(3), would reasonably have been employed, rather than "waters subject to the jurisdiction of the state" utilized in

describing the boundary of a registration area in the version of 5 AAC 34.005(b) adopted after Hjelle. While we disagree with this interpretation by the owners,[16] the ambiguity in the language employed in the regulations is evident.

Regardless of the ambiguity in delineating the registration area, however, the Emergency Orders issued by the state prior to the American Eagle's activities in the Egg Island district left little question that the entire district was closed to king crab fishing as of November 7, 1975. Authorized by AS 16.05.060, Emergency Closure Orders have the force and effect of law.[17] Although 5 AAC 34.035 specifically

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[16] See note 9 supra.

[17] As 16.05.060 states:

Emergency Openings and Closures

> This chapter does not limit the power of the commissioner or his authorized designee, when circumstances require,

authorizes the closure of registration areas, neither its terms nor those of AS 16.05.060 prohibit the closure of an entire statistical area or district thereof.[18]

(footnote 17 continued)

> to summarily open or close seasons or areas or to change weekly closed periods on fish or game by means of emergency orders. An emergency order has the force and effect of law after field announcement by the commissioner or his authorized designee. An emergency order adopted under this section is not subject to the Administrative Procedure Act.

[18] See note 5 supra. 5 AAC 34.035 provides in part:

> Closure of Registration Areas
>
> (a) The commissioner shall monitor the condition of king crab stocks in all statistical areas through the use of such data and information as are practically available.
>
> (b) When the commissioner finds that continued fishing effort would jeopardize the viability of king crab within a registration area, he shall close the registration area by emergency order.
>
> (c) In determining whether to close a registration area, the commissioner shall consider all appropriate factors

Westward Region 1975 Shellfish Emergency Orders Nos. 20 and 23 state unequivocally that the Egg Island district would close to

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(footnote 18 continued)

to the extent there is information available on such factors. Factors which may be considered include:

(1) the effect of overall fishing effort within the statistical area encompassing the registration area;

(2) catch per unit of effort and rate of harvest;

(3) relative abundance of king crab within the area in comparison with preseason expectations of the department;

(4) such guideline harvest levels as may be promulgated by regulation;

(5) the proportion of immature or softshell king crab being handled;

(6) general information on the condition of king crab within the area; and

(7) information pertaining to the maximum sustainable yield level of king crab within the registration area.

5 AAC 34.610 provides:

FISHING SEASONS. King crab may be taken or possessed from 12:00 noon November 1 through February 15 unless the registration area is closed earlier by emergency order.

king crab fishing at noon on November 7, 1975.[19] The boundaries of the Egg Island district, as already stated, are described without ambiguity in 5 AAC 34.605(c) as comprising "all Pacific Ocean waters of statistical area "O" within specified geographic lines.[20] Emergency Order No. 28, dated November 18, 1975, in no way contradicted the earlier orders. Its text states that "[t]hree districts remain open," of which none of those listed was the Egg Island district. Finally, Emergency Order No. 32, dated January 11, 1976, stated that several previously issued emergency orders, including Nos. 20, 23, and 28 "are rescinded effective immediately" because "no longer needed." The

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19 See note 3 supra.

20 See note 15 supra.

order states that the recission is effective only prospectively.[21] Thus the order cannot be interpreted to retroactively authorize crab fishing in the closed Egg Island district such as the American Eagle was alleged to have conducted, and which occurred prior to the

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21 Emergency Order No. 32 reads:

WESTWARD REGION 1975 SHELLFISH FIELD EMERGENCY ORDER NO. 32

JUSTIFICATION:

Westward Region 1975 Shellfish Field Emergency Orders No. 1-31 were issued during the year to regulate the shellfish fisheries of the Westward Region. These remain in effect until rescinded. Some of those are no longer needed whereas others must remain in effect for a time. Therefore, the following emergency order is adopted effective January 11, 1976:

EMERGENCY ORDER:

Westward Region 1975 Shellfish Field Emergency Orders No. 1 through 6 (including 3A) and 8 through 29 (including 17A) are rescinded effective immediately and No. 30 and 31 are rescinded effective March 1, 1976.

effective date of the rescinding order.

We therefore conclude that the closure of the Egg Island district by Emergency order was not "in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application" in violation of the due process rights of the American Eagle's owners. Stock v. State, 526 P.2d 3, 8 (Alaska 1974). Since the other regulations in question have been amended to eliminate the ambiguities noted in this opinion, after Bundrant clarified the extra-territorial jurisdiction question in favor of the state, there is no need to further

comment on any deficiencies existing in the past.[22]

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[22] The applicable regulations now provide (emphasis added):

> 5 AAC 34.005. STATISTICAL AREAS ESTABLISHED.
>
> . . . .
>
> (b) Each statistical area consists of
>
> (1) a registration area, comprised of all the waters within the statistical area which are territorial waters of Alaska; and
>
> (2) an adjacent seaward biological influence zone, comprised of all the waters within the statistical area which are not part of the registration area.
>
> (c) Registration areas are areas in which the department shall apply conservation and management regulations in order to protect and maintain the king crab resources of the state.
>
> (d) Adjacent seaward biological influence zones are areas which the department shall utilize to obtain biological and fishing effort data and

(footnote 22 continued)

other information necessary for the formulation of comprehensive and effective conservation and management reith sec. 10 of this chapter.

5 AAC 34.010. APPLICATION OF REGULATIONS.

(a) Notwithstanding any other provision of this chapter, all regulations in this chapter applicable to a registration area shall be applicable also in its adjacent seaward biological influence zone.

(b) Persons on a vessel navigating within an adjacent seaward biological influence zone shall conduct their operations and activities in full compliance with the regulations applicable to the appurtenant registration area.

(c) The commissioner may suspend the application of this section wholly or partially in any seaward biological influence zone if he finds that such application:

(footnote 22 continued)

(1) does not tend to facilitate enforcement of regulations applicable to a registration area;

(2) does not tend to protect or conserve king crab inhabiting territorial waters of Alaska; or

(3) that the state has an insufficient interest in the king crab inhabiting the zone to warrant extension of the jurisdiction of the state to the zone.

5 AAC 34.035. CLOSURE OF REGISTRATION AREAS.

(a) The commissioner shall monitor the condition of king crab stocks in all statistical areas through use of such data and information as are practically available.

(b) When the commissioner finds that continued fishing effort would jeopardize the viability of king crab within a registration area, he shall close the registration area by emergency order.

. . . .

III. Denial of due process of law in the seizure of the vessel.

The owners of the American Eagle also complain they were denied due process of law in that the forfeiture statutes under

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(footnote 22 continued)

(f) the foregoing provisions of this section are applicable also to closures of districts, subdistricts, section, or any other portion of a statistical area.

5 AAC 34.091. UNLAWFUL ACTS WITHIN AN ADJACENT SEAWARD BIOLOGICAL INFLUENCE ZONE. It is unlawful for any person [to take king crab or do other acts] . . . in violation of sec. 010(b) of this chapter.

5 AAC 34.610. FISHING SEASONS. King crab may be taken as follows:

(1) from 12:00 noon, September 15 through February 15 or until closed by emergency order, king crab six and one-half inches (165 mm) or greater in width of shell may be taken or possessed;

(2) during periods to be opened and closed by emergency order, king crab seven and one-half inches 191 mm) or greater in width of shell may be taken or possessed.

which the vessel, gear, and sale proceeds were seized provide for no in rem procedure or prompt post-seizure notice and hearing.[23] Given this broad deficiency the owners, in our opinion, have raised a substantial question whether the statutory scheme on its face affords adequate procedural due process. The standards of due process under the Alaska and federal constitutions require that a deprivation of property be accompanied by notice and opportunity for hearing at a meaningful time to minimize possible injury. Etheredge v. Bradley, 502 P.2d 146 (Alaska 1972). Where property allegedly used in an illicit act is confiscated by government officials pending a forfeiture action, no notice or hearing is necessary prior to the seizure. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 40 L. Ed. 2d

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[23] See note 1 supra.

452 (1974). However, when the seized property is used by its owner in earning a livelihood, notice and an unconditioned opportunity to contest the state's reasons for seizing the property must follow the seizure within days, if not hours, to satisfy due process guarantees even where the government interest in the seizure is urgent. Stypmann v. City and County of San Francisco, 557 F.2d 1338 (9th Cir. 1977); Lee v. Thorton, 538 F.2d 27 (2d Cir. 1976).

We need not reach the question of the constitutionality of the statues [sic] in question in this case, however, because it is apparent that the vessel owners were in fact afforded procedural due process. Jennings v. Mahoney, 404 U.S. 25, 30 L. Ed. 2d 146 (1971); Wiren v. Eide, 542 F.2d 757

(9th Cir. 1976).[24] The seizure of the American Eagle and other property of its owners was pursuant to a judicially

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[24] Wiren acknowledged the old line of United States Supreme Court authority on which the vessel owners rely for the proposition that due process provided as a matter of grace or in court rules does not deprive a litigant of his standing to challenge the failure to require specific procedures in the applicable statute itself. 542 F.2d at 762. See Wuchter v. Pizzutti, 276 U.S. 13, 72 L. Ed. 446 (1928); Coe v. Armour Fertilizer Works, 237 U.S. 413, 59 L. Ed. 1027 (1915); Central of Georgia Cy. Co. v. Wright, 207 U.S. 127, 52 L. Ed. 134 (1907); Security Trust and Safety Vault Co. v. Lexington, 203 U.S. 323, 51 L. Ed. 204 (1906); People v. Broad, 12 P.2d 941 (Cal.), cert. denied sub nom. People v. General Motors Acceptance Corp., 287 U.S. 661 (1932). Wiren explained that these past decisions must be read in light of the Supreme Court's more recent self-imposed rules of restraint in deciding constitutional questions. 542 F.2d at 762. See United States v. Raines, 362 U.S. 17, 4 L. Ed. 2d 524 (1960). Jennings was not discussed in Wiren, but held that a person whose driver's license was summarily suspended by an administrative agency could not challenge the validity of the applicable statute, even though the statute's constitutionality presented a "substantial question," where the license suspension had been stayed pending completion of judicial review.

approved warrant issued under Alaska Rule of Criminal Procedure 37.[25] Under this rule's requirements, one of the owners on

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[25] The quasi-criminal nature of forfeiture proceedings under AS 16.05.190-.195 has been recognized by this court in Graybill v. State, 545 P.2d 629, 631 (Alaska 1976). Alaska R. Crim. P. 37 provides in part:

> (b) Execution and Return with Inventory. The warrant shall be executed and returned within 10 days after its date. The officer taking property under the warrant.
>
> (1) shall give to the person from whom or from whose premises the property was taken a copy of the warrant, a copy of the supporting affidavits, and receipt for the property taken, or
>
> (2) shall leave the copies and the receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken as a result of the search pursuant to or in conjunction with the warrant. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or

board the vessel at the time of the seizure was formally notified then of the state's action. The other owners indicated that they in fact received timely notice of the seizure, for prior to the state's filing of a formal civil complaint for forfeiture thirteen days after the vessel was seized, their attorneys mentioned the possibility of suing for release of the vessel. The owners had an immediate and unqualified

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(footnote 25 continued)

> premises the property was taken, and shall be signed by the officer under the penalty of perjury pursuant to AS 09.65.012. The judge or magistrate shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.
>
> (c) Motion for Return of Property and to Suppress Evidence. A person agrieved by an unlawful search and seizure may move the court in the judicial district in which the property was seized or the court in which the property may be used for the return of the property and to suppress for use as evidence anything so obtained on the ground that the property was illegally seized.

right to contest the state's justification for the seizure before a judge under Criminal Rule 37(c).[26] Rather than avail themselves of this opportunity, the owners negotiated the release of the vessel and its gear to local fishing by entering into a voluntary stipulation of a bond with the state; the parties also agreed to have the seized crab sale proceeds placed in an interest-bearing account pending completion of the suit for forfeiture.

We find no merit in the owners' apparent claim that due process requires that any owner of a vessel seized by the state for suspected use in illegal activity has an absolute right to obtain release of the property upon the posting of an adequate bond. To permit this would frustrate one purpose of forfeitures, which is to

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[26] See note 25 supra.

prevent possible use of the property in further illicit acts. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 687, 40 L. Ed. 2d 452, 470 (1974). While Calero-Toledo suggests that due process may require owners of seized property to have a right to its return when they can show they were not aware of or negligent in allowing illegal use of the property,[27] none of

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[27] In Calero-Toledo, the United States Supreme Court upheld the forfeiture of a yacht used to illegally transport marijuana against a claim by its owners for its return, even though the owners had leased the yacht to the persons committing the crime without knowledge that the vessel would be so used. The opinion stated, however:

> [I]t would be difficult to reject the constitutional claim of an owner whose property had been taken from him without his privity or consent . . . . Similarly, the same might be said of an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that could reasonably be expected to prevent the proscribed use of the property; for in that circumstance, it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive.

416 U.S. at 689-90, 40 L. Ed. 2d at 471-72 (citations and footnotes omitted).

the owners appealing the seizure here have demonstrated that they are completely innocent third parties. Unlike the claimants held entitled to relief from forfeiture in the cases cited by the owners, the three owners of the American Eagle are all active partners in the business enterprise of operating the vessel.[28] They share the profits and risk of loss from its fishing activity. Hjelle skippered another

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[28] Cf. United States v. One 1972 Chevrolet Blazer, 563 F.2d 1386 (9th Cir. 1977) (case remanded for full evidentiary hearing where court summarily denied a petition for remission under federal forfeiture statute; owner of car alleged he had not known of or condoned the illegal carrying of a gun silencer in the vehicle by his father, and government had not alleged negligence by the owner); United States v. One Mercury Cougar XR7, 397 F. Supp. 1325 (C.D. Cal. 1975) (owner loaned her car to boyfriend to pick up passenger at airport and the car was seized when the boyfriend and passenger were arrested for sale of heroin; held violative of due process not to return the car to the owner where record showed she had no awareness of the car's possible illegal use and had done all which reasonably could be expected to prevent the illegal use).

crab-fishing vessel in the Egg Island area while it was open during the season in question, and was one of the named plaintiffs in the Hjelle suit over the jurisdictional authority of the state to regulate crab fishing. Hansen was responsible for keeping records of the American Eagle's operating expenses. Under such circumstances, it is not unduly oppressive to charge Hjelle and Hansen with knowledge and control of the American Eagle's activity, even though they were not on board at the time of the alleged infractions as was co-owner Tynes.

IV. Error in the forfeiture of the bond and sale proceeds ordered by the superior court.

A. Forfeiture of the bond in lieu of the vessel, and failure to order an increase in the bond.

The state in its cross-appeal argues that the superior court erred in allowing the owners of the American Eagle to forfeit

the $350,000 bond they posted, rather than requiring the forfeiture of the vessel itself, or ordering an increase in the value of the bond to reflect a rise in the vessel's appraised value subsequent to the stipulation whereby the vessel was released.[29] The state contends particularly that the superior court erred in relying on the general rules of admiralty law in holding that the stipulated bond served as a complete substitute for the res, thereby limiting the state's recovery to that bond, rather than a form of bail in order to allow for the temporary release of the vessel only. We hold that no error was committed by the superior court in this regard.

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[29] The appraised value of the vessel has apparently increased to approximately $1.3 to $1.5 million, including a federal government mortgage in addition to the equity interest of the appellants.

We look first to the language of the stipulation of February 10, 1976, to resolve this question. We must conclude that by itself the stipulation is ambiguous. The document identifies the vessel and gear as part of the res in the forfeiture action, and requires the owners, "on an order of a court of competent jurisdiction," to deliver the vessel and gear to the Port of Kodiak. It requires the owners to "technically seize" crab pots belonging to the vessel and stored in Alaska waters, acting as "agents" of the state. These provisions indicate an intent by the state to obtain rights to the vessel. However, the document also states that "said release [is] to be final with no right by claimants to return said vessel and relieve themselves of the conditions thereof until a final judgment of this or an appellate court is entered" (emphasis added) and includes as a reason for release "that the

vessel may locally fish," indicating the state's lack of interest in preventing further use of the vessel by its owners.[30]

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[30] The stipulation reads:

STIPULATION

WHEREAS, the State of Alaska is preparing to file a civil complaint for forfeiture and damages in the above-entitled matter (copy attached) and;

WHEREAS, the filing of this forfeiture complaint according to some authorities must be preceded by seizure of the res and;

WHEREAS, part of the res in this case is the fishing vessel American Eagle, a steel-hulled vessel with all her own boat gear valued at approximately $350,000 and;

WHEREAS, this vessel is presently in the custody of the State of Alaska having been seized pursuant to the warrant for search and seizure and;

WHEREAS, part of the res in this case is the number of king crab pots now located near Juneau in Alaska waters and;

WHEREAS, it is agreeable to restore the vessel to claimant so that the vessel may locally fish and collect her crab gear,

IT IS AGREED AND STIPULATED as follows:

(footnote 30 continued)

1. William B. Rozell of Faulkner, Banfield, Doogan & Holmes will enter his appearance for defendants named herein and waive formal service of process of this complaint.

2. That Harold P. Hansen, Hjelle Enterprises, Inc. and Tynes Enterprises, Inc., Seattle, Washington, by and through counsel William B. Rozell do hereby enter their claim as their interests may appear, to the res to be forfeited in this complaint.

3. That Harold P. Hansen, Hjelle Enterprises, Inc. and Tynes Enterprises, Inc. do hereby agree to retake care, custody and control of the vessel from the State and to hold the State harmless as for any damage which may occur after the time of possession is retaken.

4. That Harold P. Hansen, Hjelle Enterprises, Inc. and Tynes Enterprises, Inc. do hereby agree to act as agent for the State, technically seizing the crab pots of the American Eagle wherever they may be.

5. That Harold P. Hansen, Hjelle Enterprises, Inc. and Tynes Enterprises, Inc. further agree to waive any and all requirements that the State seize said crab pots.

6. That Harold P. Hansen, Hjelle Enterprises, Inc. and Tynes Enterprises, Inc. further agree to execute a promissory note (copy attached) to the State secured by a preferred ship

(footnote 30 continued)

mortgage (copy attached) and to secure endorsement of the policy of insurance on the vessel to the State of Alaska as their interest may appear in the amount of the appraised value of the vessel, unless insurance in this amount is unavailable then in the amount of insurance that can be obtained commercially, keeping said policy in full force and effect for the vessel's full value until relieved by order of this or an appellate court.

7. That Harold P. Hansen, Hjelle Enterprises, Inc. and Tynes Enterprises, Inc. further agree not to remove said vessel and crab pots permanently from the United States or on an order of a court of competent jurisdiction to deliver said vessel and crab pots to the Port of Kodiak in as good a condition as when seized, normal wear and tear excepted.

8. That plaintiff State of Alaska agrees that simultaneously with the filing of the complaint herein that it will move the Superior Court for release of said vessel to claimants subject to the conditions expressed in this Stipulation, said release to be final with no right by claimants to return said vessel and relieve themselves of the conditions thereof until a final judgment of this or an appellate court is entered.

The promissory note for $350,000 executed by the owners as required by the stipulation contains equally ambiguous language, providing "[t]he undersigned

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(footnote 30 continued)

DATED in Anchorage this ___ day of February, 1976.

AVRUM M. GROSS
ATTORNEY GENERAL

By: _____
Gerald W. Markham
Assistant Attorney General

FAULKNER, BANFIELD, DOOGAN & HOLMES

_____
William B. Rozell
of Attorneys for Defendants

ORDER

IT IS ORDERED that the vessel American Eagle presently under seizure be released to the care, custody and control of defendant/claimants subject to the terms expressed in the Stipulation.

DATED this ___ day of February, 1976.

_____
Superior Court Judge

promises to pay the State of Alaska the sum of any fine for forfeiture assessed the vessel American Eagle by a court of competent jurisdiction . . ." and "in the event that the American Eagle is delivered to a port within the State of Alaska . . . [t]his note shall be null and void," but that "[t]he amount due under this note shall not exceed $350,000" and "[t]his note is executed solely for the purpose of providing security to the State of Alaska for any fine or forfeiture which may be assessed. . . ."[31] The stipulation

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[31] The note reads in full:

PROMISSORY NOTE

> The undersigned promises to pay the State of Alaska the sum of any fine or forfeiture assessed the vessel American Eagle by a court of competent jurisdiction arising out of any action now commenced or to be commenced within the next ninety (90) days, arising out of any alleged illegal crabbing activities in which the vessel American Eagle is alleged to have engaged from November 8, 1975

(footnote 31 continued)

until the present in the State of Alaska and that said fine shall be paid the State of Alaska within thirty (30) days after any final judgment is entered or if appeal is taken therefrom within thirty (30) days after entry of a mandate by the appropriate appellate court. The amount due under this note shall not exceed $350,000.

This note shall not be construed as an admission of any liability or as an admission that the American Eagle's owner, skipper and crew separately or collectively have engaged in any illegal activity; or as an acknowledgedment [sic] that the seizure of the vessel American Eagle by the State of Alaska was and is a valid and legal action. This note is executed solely for the purpose of providing security to the State of Alaska for any fine or forfeiture which may be assessed by a court of competent jurisdiction.

In the event a fine or forfeiture is not entered against the American Eagle, or in the event that the authority of the State under which the vessel American Eagle was seized is held invalid by a final order of a court or if appeal is taken, after entry of a mandate by the appropriate appellate court, or in the event that the American Eagle is delivered to a port within the State of Alaska and notice of said delivery is given to the office of the Attorney General of Alaska, or in the event the vessel is totally lost or destroyed by fire, sinking or similar accident covered by

agreement requires the owners to secure insurance on the vessel "in the amount of the appraised value of the vessel" and the promissory note requires the proceeds of the insurance to be tendered to the state in case of loss of the vessel. However, the stipultion agreement recites that the vessel and its gear at the time of the stipulation were "valued at approximately $350,000.[32] While these provisions are consistent with an intent by the state to

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(footnote 31 continued)

> the hull insurance on the vessel and the undersigned's interest in the proceeds of said hull insurance are tendered to the State of Alaska or deposited with the Clerk of the Superior Court or the Clerk of the United States District Court, then in that event this note shall be null and void and in no further force or effect and the State of Alaska will take all steps necessary to release all its right, title, and interest in the vessel American Eagle.

[32] See notes 30 and 31 supra.

retain sufficient security to ensure the return of the vessel itself upon judgment, they also may be interpreted as an understanding between the parties that the bond and insurance provisions would completely satisfy the state's interest in exacting a penalty from the vessel owners if forfeiture was ordered. The state's willingness to release the vessel so that it could continue to be used in local fishing could indicate a lack of resources for storing and maintaining the vessel as well as a decision that the vessel was unlikely to be used in further violations, but these reasons for release can apply equally to the state's concerns either before or after a forfeiture judgment.

It was therefore proper for the trial judge to look to relevant case law, absent explicit guidance in the forfeiture statutes, to interpret the stipulation. Federal admiralty cases have uniformly held

that stipulation agreements for the value of a vessel generally serve as complete substitutes for the res; once posted, they limit recovery to that amount. See United States v. Ames, 99 U.S. 35, 25 L. Ed. 295 (1878); J.K. Welding v. Gotham Marine Corp., 47 F.2d 332 (S.D.N.Y. 1931). Such stipulations constitute an agreement with the court, involving substitution of a chose [sic] in action against the owner in place of the vessel sued in rem. The bond filed becomes the res which alone is sufficient to give the court in rem jurisdiction. J.K. Welding Co. v. Gotham Mining Corp., 47 F.2d 332, 334-35 (S.D.N.Y. 1931). Under the rules of admiralty, once a stipulation for value is posted with the court, the once-seized vessel is free from re-arrest in the same action. See The Shreveport, 42 F.2d 524, 527 (E.D.S.C. 1930). Absent fraud, mistake, or duress, the amount of the stipulation bond will not

be raised even though the value of the vessel increases. United States v. Ames, 99 U.S. 35, 25 L. Ed. 295 (1978).

The state complains that the above cases deal with commercial liens operating under established admiralty rules. However, the same rules have been applied as well to a government forfeiture proceeding against a vessel for transporting contraband. The Ruth, 20 F.2d 314 (3d Cir. 1927). The state also cites admiralty cases in which courts used their discretion to refuse to release vessels on bond absent a stipulated provision for return of the vessels in case forfeiture was upheld. See The Seal, 45 F.2d 243 (S.D. Cal. 1929); United States v. The Memory, 111 F. Supp. 131 (D. Del. 1953). But these cases do not lead to the conclusion that the trial judge here erred in interpreting the ambiguous and conflicting language of the particular stipulation approved in this

case as he did. Limiting the owners' forfeiture liability to the amount of the bond, despite a provision in the agreement for the return of the vessel upon order of the court, is consistent with treating the vessel as alternate security for the bond amount to ensure payment of the promissory note. Finally, the state argues that because the trial court's final order of December 1, 1977, decreed forfeiture of the ship and ordered the vessel's return to Kodiak, forfeiture of the vessel itself was the intention of the stipulation. Under admiralty law, however, the court must decree forfeiture against the vessel before final judgment against the substitute bond is entered. The Ruth, 20 F.2d 314 (3d Cir. 1927). The superior court's later order requiring substitution of the bond for forfeiture of the vessel is in accord with this rule.

The same result is indicated in any event under Alaska case law. Although civil in form, forfeiture actions are basically criminal in nature. Graybill v. State, 545 P.2d 629, 631 (Alaska 1976). As a general rule, forfeitures are disfavored by the law, and thus forfeiture statutes should be strictly construed against the government. One Cocktail Glass v. State, 565 P.2d 1265, 1268-69 (Alaska 1977). The conditions upon which the vessel was voluntarily released by the government are not clear from the stipulation. Furthermore, one of the reasons cited for releasing the vessel, to enable it to return to fishing, is inconsistent with one of the state's justifications for requiring forfeiture of the vessel itself -- preventing further illegal fishing. In this context the better interpretation of the agreement is that in favor of the

owners of the vessel, against whom this more substantial penalty could be assessed.

B. Whether forfeiture of the bond was an excessive penalty.

The owners of the vessel complain, on the other hand, that even forfeiture of the bond was an abuse of the trial court's discretion under AS 16.05.195 to order forfeiture of all, part, or none of the res. See One Cocktail Glass v. State, 565 P.2d 1265, 1271 n.11 (Alaska 1977). They argue that the uncertainty of the law regulating the crab fishery prior to the Bundrant decision mitigated the seriousness of the vessel's offenses. Hansen and Hjelle in addition contend they are being unduly penalized because they were not on board the vessel at the time of the alleged infractions.

Yet the owners admit their awareness of the pendency of the Bundrant appeal

during the 1975-76 season and therefore of the unsettled nature of the jurisdictional question in the courts of this state. We have already concluded that the regulatory scheme in effect gave adequate notice to the vessel's owners of the violations alleged. In this light the stated position of the owners if anything evidences a willingness to deliberately violate existing laws in hopes that they will be declared invalid at a later date. The fact that two of the active partners in the operation of the vessel were not on board when the violations occurred does not relieve them of responsibility for its illegal use, as has already been discussed. The violations alleged involved taking for commercial profit a crucial biological resource of the state, the existence of which depends on careful regulation of harvest. In these circumstances we hold that forfeiture of the bond and crab sale

proceeds was not an abuse of the superior court's discretion.

V. Admissibility of certain state evidence.

In addition to witnesses who testified to seeing the American Eagle in the Egg Island district and finding American Eagle crab pots in that district, the state produced several biologists and fish and game officials who testified regarding differentials in the size, weight, and geographical locations of crab species in statistical area O and introduced into evidence a study on the size and migratory habits of king crab in the Unalaska area. The state introduced this evidence in order to show it unlikely that the crabs seized from the American Eagle came from the Western District of area O, where the vessel owners claimed they were caught, essentially by showing that Egg Island district crabs tend to be distinctly

smaller than those from the Western District and that the crabs seized from the American Eagle were of the size to be expected from the Egg Island district. The vessel owners argue that this evidence should not have been admitted as it is statistically unreliable, due to the limited size and location of the samples upon which some of the statistical conclusions were based and due to alterations in the fish tickets upon which conclusions about the average size of crabs from different districts were based. In addition, the owners claim the superior court erred in refusing to admit new evidence obtained after the trial that smaller crabs could be caught in the Western District.

On review by this court, "[a] trial judge will only be reversed for admitting prejudicial, but otherwise relevant, evidence if he has committed a 'clear abuse of discretion.'" Poulin v. Zartman, 542

P.2d 251, 260 (Alaska 1975), citing Davis v. Chism, 513 P.2d 475, 479 (Alaska 1973). The test of relevancy is whether the evidence has some tendency in reason to establish a proposition material to the case. Alaska R. Evid. 401; Hutchings v. State, 518 P.2d 767, 769 (Alaska 1974). If the evidence is relevant, reversal is appropriate only where its prejudical effect so outweights its probative value that admission constitutes a clear abuse of discretion. Poulin v. Zartman, 542 P.2d 251, 260 (Alaska 1975).

In the instant case the testimony, statistical evidence, and fish tickets admitted by the superior court were relevant to the question of where the American Eagle's crabs were likely to have been caught. Both sides presented their arguments before the superior court regarding the reliability of the evidence prior to its admission. Some question was raised

regarding the statistical validity and accuracy of the evidence. However, the state also substantiated its claims based on its own sampling of crab populations with samples taken from commercial crab catches and interviews with commercial fishermen. Alteration of the fish tickets, in the form of filling in data such as the number of crabs in a catch and the registration area from which the crabs were taken, was justified by the state as necessary when the fishermen and processors required by law to submit such information omitted it. The sources for supplying the omitted information were identified as the fishermen and processors themselves as well as direct measurements of samples from catches and direct observations of vessels. We believe that any deficiencies in the evidence go primarily to its weight rather than its admissibility, and cannot conclude from a review of the record that any of the

evidence was sufficiently misleading to outweigh its probative value and render its admission a clear abuse of discretion. Likewise, we conclude that the additional evidence of smaller crabs caught in the Western District does not sufficiently refute the generalizations regarding crab size reached from the other evidence to indicate that the superior court's refusal to consider that evidence was an abuse of discretion.

VI. Attorney's fees and costs.

We reject the vessel owners' claim that the award of costs and attorney's fees to the state was in error. The superior court awarded the state $55,000, advancing two reasons for its decision: 1) the award "in the discretion of the Court is a reasonable fee" based upon the precedent-setting, complex nature of the case, and 2) the amount awarded approximated 10% of the value of the total judgment against the

owners "but with an additional amount added due to the complexity and novelty of the issues involved." We will interfere with the broad discretion accorded the superior court in awarding attorney's fees only where the award appears to be "manifestly unreasonable." Alaska Placer Co. v. Lee, 553 P.2d 54, 63 (Alaska, 1976). The award in this case is supported by both Civil Rule 82(a)(1), allowing the court to award the percentage of any money judgment indicated by the statute "[u]nless the court, in its discretion, otherwise directs," and Civil Rule 82(a)(2) providing that the court shall base its award on the "amount and value of legal services rendered" "[i]n actions where the money judgment is not an accurate criteri[on] for

determining the fee."[33] Awarding $55,000 in fees, regardless of its relationship to the judgment against the vessel owners, is not "manifestly unreasonable" in our opinion for complex litigation which extended for over two years.

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[33] Alaska R. Civ. P. 82(a) states:

> (a) Allowance to Prevailing Party as Costs.
>
> (1) Unless the court, in its discretion otherwise directs, the following schedule of attorney's fees will be adhered to in fixing such fees for the party recovering any money judgment therein, as part of the costs of the action allowed by law:

ATTORNEY'S FEES IN AVERAGE CASES

	Contested	Without Trial	Non-Contested
First $2,000	25%	20%	15%
Next $3,000	20%	15%	12.5%
Next $5,000	15%	12.5%	10%
Over $10,000	10%	7.5%	5%

The vessel owners claim they should be entitled to the "public interest" exception to the normal award of attorney's fees to the prevailing party. See Girves v. Kenai Peninsula Borough, 536 P.2d 1221 (Alaska 1975); Gilbert v. State, 526 P.2d 1131 (Alaska 1974). This case is basically a dispute between the state and three individuals, concerning valuable private property seized for violating state laws regulating a commercial enterprise. The

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(footnote 33 continued)

> Should no recovery be had, attorney's fees for the prevailing party may be fixed by the court as a part of the costs of the action, in its discretion, in a reasonable amount.
>
> (2) In actions where the money judgment is not an accurate criteri[on] for determining the fee to be allowed to the prevailing side, the court shall award a fee commensurate with the amount and value of legal services rendered.
>
> (3) The allowance of attorney's fees by the court in conformance with the foregoing schedule is not to be construed as fixing the fees between attorney and client.

substantial economic interest at stake is not of the type which is protected by the "public interest" exception, so we find no merit to this argument by the owners.[34]

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[34] We faced a similar issue regarding attorney's fees on appeal in Thomas v. Bailey, 611 P.2d 536, 539 & n.9 (Alaska 1980):

> In determining the amounts of attorney's fees on appeal in public interest litigation, we believe that the same considerations are applicable as at the trial level. When a sufficient public interest in involved, it is therefore appropriate to award full attorney's fees on appeal to a successful public interest litigant. At times, such a decision may depend upon a balancing of the public and private interests involved in pressing the litigation.
>
> We have utilized such a balancing test in determining whether attorney's fees should be assessed against an unsuccessful party claiming to have litigated a question of public interest. Where the sums at stake in the controversy are sufficiently large to prompt suit regardless of the public interest, an award of attorney's fees against the losing party has been found reasonable. In such cases, the concern that fear or expense will significantly deter citizens from litigating questions of general

We find the owners' other contentions, that an award for attorney's fees above and beyond the res forfeited in the action is barred, and that certain costs granted to the state in addition to the attorney's fees award should not have been allowed, to be equally without merit.[35]

(footnote 34 continued)

> interest to the community is inapplicable. Similarly, questions which primarily affect the private rights of the parties before the court lack the requisite public character to prohibit an award, even if some public or constitutional issues are involved. [citations omitted] [footnote integrated into text]

[35] The owners claim that the state should not have been allowed to claim any costs because notice of the date of the hearing on the costs bill was not timely served as required by Alaska R. Civ. P. 79(a). However, the assistant attorney general called the owners' attorney within the ten-day period, offering to set a mutually convenient hearing date, which offer was refused. This is sufficient compliance with Alaska R. Civ. P. 79(a)'s requirement that notice of the hearing date be served "together with" the costs bill within the ten-day period.

The ruling of the court below is AFFIRMED.

CONNOR, Justice, dissenting.

I dissent for the same reasons which I stated in my dissenting opinion in State v. Bundrant, 546 P.2d 530 (Alaska 1976). See also my dissent in State v. Sieminski, 556 P.2d 929, 935 (Alaska 1976).

In my view, the state does not have jurisdiction beyond the three mile limit. This proposition is strengthened by Congress' action in setting up fisheries management controls in the area outward from the three mile limit. Any regulatory activities of the state in the area outside the three mile limit would have to be accomplished under the aegis of federal authority.

(footnote 35 continued)

The owners also object to the award of costs for plane fare for an out-of-state witness. This cost is explicitly allowed in lieu of in-state mileage by Alaska R. Admin. P. 9(b).

APPENDIX B

THE SUPREME COURT OF THE STATE OF ALASKA

THE F/V AMERICAN EAGLE, ADF&G NO. 38 and $100,677.50 REPRESENTING THE PROCEEDS OF 143,825 lbs. OF ALASKA KING CRAB DELIVERED PURSUANT TO ADF&G FISH TICKET NO.'S E95626, E95627, Appellant, Cross-Appellee Appellee, v. STATE OF ALASKA, Appellee, Cross-Appellant Appellant.	File No. 3973, 3973, 3974, 4023 MANDATE

TO: Superior Court of the State of Alaska, Third Judicial District at Kodiak.

The F/V American Eagle ADF&G No. 38 and $100,677.50 representing the proceeds of 143,825 lbs. of Alaska King Crab Delivered pursuant to ADF&G Fish Ticket Nos. E95626 and E95627 filed an appeal from certain orders of the Superior Court, Third Judicial District at Kodiak in Civil action no. 76-16023 entitled, "STATE OF ALASKA, Plaintiff vs. THE F/V AMERICAN EAGLE, ADF&G

NO. 38 and $ 100,677.50 REPRESENTING THE PROCEEDS OF 143,825 lbs of ALASKAN KING CRAB DELIVERED PURSUANT TO ADF&G FISH TICKET NO'S E95626, E95627, Defendants". The State of Alaska Cross-appealed from the same orders. The State of Alaska appealed from certain other orders of the Superior Court. The case was heard by this court on October 16, 1979. On November 21, 1980, the court filed its written opinion. Appellant's The F/V American Eagle petition for rehearing was denied by this court on March 4, 1981.

IT IS ORDERED:

The orders of the Superior Court, entered December 1, 1977, February 9, 1978 and March 30, 1978, respectively, are affirmed.

Appellee State of Alaska shall recover from Appellant's The F/V American Eagle attorney fees of $ 500.00.

Entered by direction of the Court and pursuant to Appellate Rule 507 at Anchorage, Alaska, on March 5, 1981.

CLERK OF THE SUPERIOR COURT

SEAL

s/
Robert D. Bacon

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF ALASKA

THE F/V AMERICAN EAGLE, et al.,	)	
	)	Supreme Court
Appellants,	)	Nos. 3973/
	)	3974/4023
v.	)	
	)	
STATE OF ALASKA,	)	
	)	
Appellee,	)	
	)	

Before: Rabinowitz, Chief Justice, Connor, Burke and Matthews, Justices, and Stewart, Superior Court Judge. (Compton, Justice, not participating.)

On consideration of the petition for rehearing filed December 22, 1980,

IT IS ORDERED:

The petition for rehearing is denied.

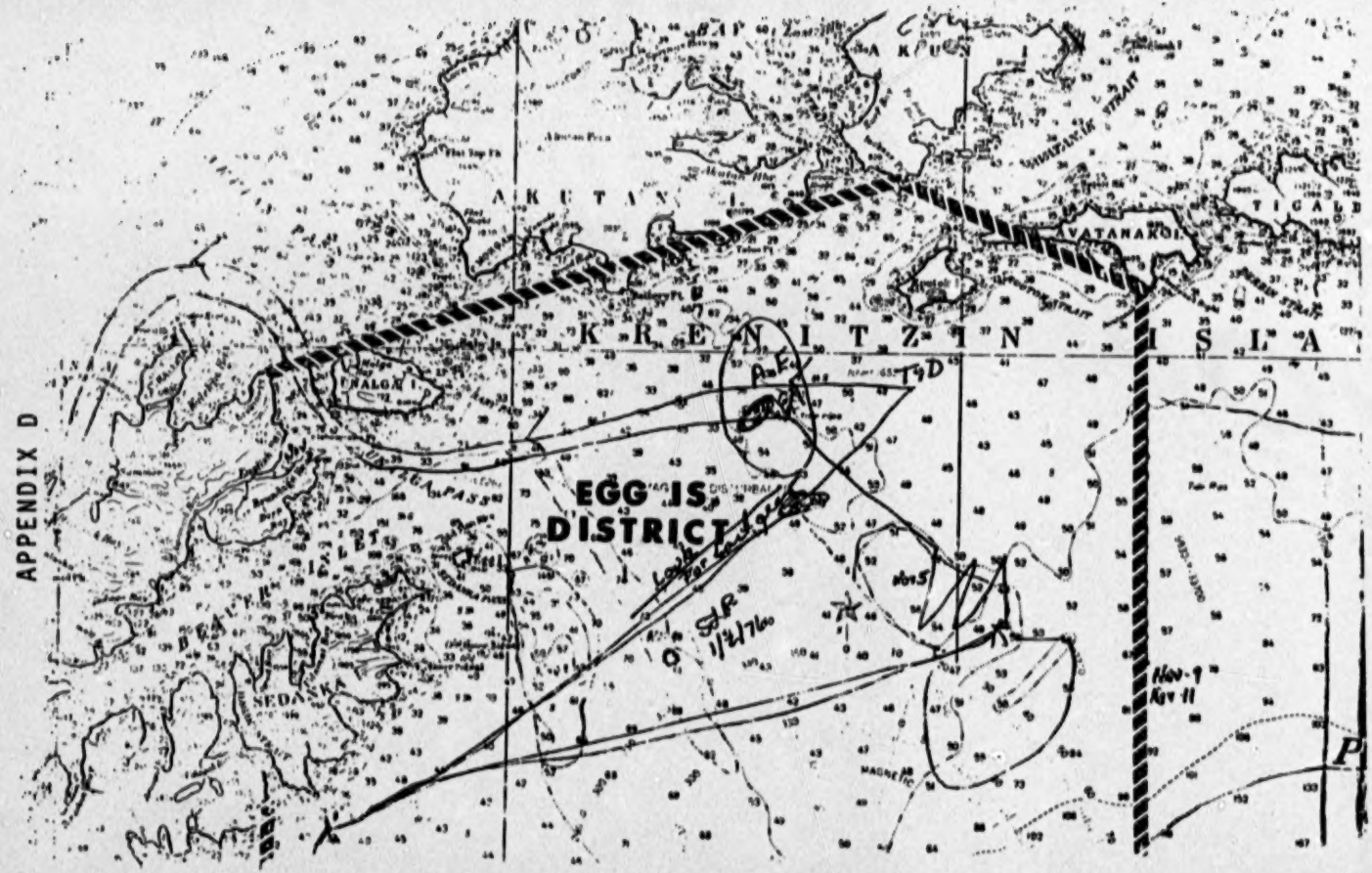
Entered by direction of the court at Anchorage, Alaska on March 4, 1981.

CLERK OF THE SUPREME COURT

s/
ROBERT D. BACON

ccs: Justices
Counsel

APPENDIX D


AKUTAN I.
KRENITZIN ISLA
EGG IS.
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VATANAKOI
SEDANKA
BEAR PASS
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APPENDIX E

THE SUPREME COURT OF THE STATE OF ALASKA

THE F/V AMERICAN EAGLE, ADF&G NO. 39 and $100,677.50 REPRESENTING THE PROCEEDS OF 143,825 lbs. of ALASKA KING CRAB DELIVERED PURSUANT TO ADF&G FISH TICKET NO.'S E95626, E95627, Appellant, vs. STATE OF ALASKA, Appellee,	File No. 3973 3973 (No. 2227 - November 21, 1980
STATE OF ALASKA, Appellant/Cross-Appellee, vs. THE F/V AMERICAN EAGLE, ADF&G NO. 39 and $100,677.50 REPRESENTING THE PROCEEDS OF 143,825 lbs. of ALASKA KING CRAB DELIVERED PURSUANT TO ADF&G FISH TICKET NO'S E95626, E95627, Appellee/Cross-Appellant.	File Nos. 3974/4023

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

PLEASE TAKE NOTICE, and notice is hereby given, that claimants-appellants

Severin Hjelle, Reidar Tynes, and Harold Hansen hereby appeal to the Supreme Court of the United States from the final judgment of this court dated November 21, 1980 affirming the judgment of the trial court, from the order denying the petition for rehearing dated and entered March 3, 1981, and from the mandate dated and entered March 4, 1981, and from the whole thereof.

This appeal is taken pursuant to Title 28, U.S.C. § 1257(2).

The clerk will please certify and transmit the entire record to the Supreme Court of the United States.

The following are questions presented by this appeal:

1. Whether the jurisdiction of the State of Alaska is limited to three miles from shore and any sovereignty beyond that point is vested exclusively in the federal government.

2. Whether the federal government has exclusive jurisdiction of the resources of the continental shelf, including crab.

3. Whether the State of Alaska is prohibited from assuming jurisdiction over international waters.

4. Whether Alaska may regulate and control fishing by citizens of other states outside Alaska's territory.

5. Whether the Alaska statutes and regulations are impermissibly vague and their enforcement denied claimants due process of law.

6. Whether claimants were denied due process by the absence of any in rem procedure under Alaska law and the failure of Alaska law to provide a prompt post-seizure hearing.

7. Whether enforcement of Alaska law as to king crab outside Alaska territory and attempted enforcement under

impermissibly vague statutes and regulations is violattive of the Supremecy Clause, Article VI, Clause 2. The Commerce Clause, Article I, § 8, and the Due Process Clause, Fourteenth Amendment of the Constitution of the United States.

DATED this 1st day of April, 1981.

s/
DOUGLAS M. FRYER, of Moriarty, Mikkelborg, Broz, Wells & Fryer

s/
WILLIAM B. ROZELL, of Faulkner, Banfield, Doogan & Holmes

Attorneys for Appellants and Appellee/Cross-Appellant.

PROOF OF SERVICE

I, DOUGLAS M. FRYER, one of the attorneys for Appellants and Appellee/ Cross-Appellant herein, a member of the bar of the Supreme Court of the United States, hereby certify that on the ____ day of April, 1981, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States, on the several parties thereto as follows:

On the State of Alaska by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to

John G. Gissberg
State of Alaska
Department of Law
420 L Street, Suite 100
Anchorage, AK 99501

s/_____
DOUGLAS M. FRYER, of Moriarty, Mikkelborg, Broz, Wells & Fryer

APPENDIX F

SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT KODIAK

STATE OF ALASKA Plaintiff, vs. THE F/V AMERICAN EAGLE, ADF&G No. 39 and $100,677.50 Representing the Proceeds of 143,825 lbs. of Alaska King Crab Delivered Pursuant to ADF&G Fish Ticket Nos. E95626, E95627, Defendants.	NO. 76-16023

O R D E R

This matter having come on before the Court for hearing on Costs, Award of Attorney Fees, Delivery of Vessel, Motion to Vacate Stipulation for Value, and Motion for New Trial, the Court having heard and considered arguments of counsel and having read and considered counsel's briefs on the law and having reviewed the Stipulation for Value and other documents filed herein and being fully advised in the premises,

IT IS ORDERED that the Motion for New Trial and to Vacate Stipulation for Value, be and they are hereby denied.

That the Motion for Delivery of Vessel, Award of Attorney Fees and Costs are granted as follows and for the reasons stated.

Costs are allowed in the amount of $3,640.67 as set for below:

1.	Publication of Notice of Forfeiture	$196.00
2.	Deposition of Dexter Lall:	
	a. Burton & Wilkerson-- preparation of deposition	$167.00
	b. Filing fee for deposition	32.00
3.	Copy of Deposition of James Brooks by Taku Reporters	$ 87.22
4.	Deposition of John Ploeger by Burton & Wilkerson	$ 85.00
5.	Deposition of Collin Martins	
	a. Burton & Wilkerson	$ 89.00
	b. Mr. Martins' travel	$ 73.82
6.	WITNESS STEPHEN BRUNDAGE	
	a. Travel (Airplane Fare)	$696.53
	b. Per Diem (2-1/2 days)	$ 52.50
	c. Witness Fees	$ 15.00

7.	WITNESS DUANE PHINNEY:	
	a. Travel (Airplane Fare)	$293.00
	b. Per Diem (5 days)	$105.00
	c. Witness Fees	$ 30.00
8.	WITNESS JAMES NURRKA:	
	a. Travel (Airplane Fare)	$472.60
9.	WITNESS LARRY EDFELT	None
10.	WITNESS PAUL TATE:	
	a. Travel (Airplane Fare)	$472.62
	b. Per Diem (8-3/4 days)	$183.00
11.	WITNESS IVAN FROHNE:	
	a. Travel (Airplane Fare)	$249.16
	b. Bus Fare in lieu of Mileage	$ 6.00
	c. Per Diem (5 days)	$105.00
12.	WITNESS JAMES NUTGRASS:	$ 90.00
13.	TELEPHONE BILL	$ 39.14
		$3640.67

Attorney fees are awarded in the amount of $55,000, which in the discretion of the Court is a reasonable fee to be allowed based upon the fact that this case represents a case of first impression in the Courts of Alaska, there were numerous issues to be resolved, much testimony was adduced of an unusual nature, and the case involved several novel points of law on

which there is no clear precedent and therefore from an attorney's standpoint would be unusually lengthy and sometimes complicated. This fee is based upon the further fact that the Court feels and as hereafter stated recovery will and should be limited to the amount of the Stipulation for Value and of the value of the crab represented by the fish tickets for the seized crab and therefore approximates 10% of such value but with an additional amount added due to complexity and novelty of the issues involved as herein stated.

Since the res which is the subject of the forfeiture in this action is a registered, documented vessel of the United States and since the statutes of this State and rules of this Court do not set forth any procedure to guide the Court or parties on how a forfeiture is to be carried out, it is necessary to look to procedures of a similar nature in other

Courts. The most well-established are those of Admiralty in the Federal Courts and the authority there seems to be that when a Stipulation for Value is entered into by the parties and approved by the Court, it takes the place of the vessel for the purposes of the libel and that the vessel cannot thereafter be rearrested for the same cause of action. That the Stipulation for Value is a "complete" substitution for the res. J. K. Welding Co. v. Gotham Marine Corp. or "The New England" case 47 Fed. 2d 332 (335) S.D. NY 1931; U.S. v. Ames 25 Law. Ed. 229; 99 U.S. 35 1878; Sellick v. U.S. 20 Fed. 2d 314 (315), "The Ruth" case Civ. Court of Appeals 3rd Civ. 1927 and in "The John Cadwalader" case 42 Fed. 2d 781, E. D. Penna. 1930. "It nonetheless, however, remains true that the filing of the stipulation in a required sum is a purchase of the freedom of the vessel. Ordinarily that freedom should thereafter be undisturbed".

Here, the Stipulation for Value appears to have been intended to represent the Claimant's equity in the vessel at the time of the seizure, it contains no provision for a reappraisal at a later date or for a recomputation of the equity in the future as payable to the U.S. Government are made to reduce the amount of the preferred mortgage on the vessel, and presumably was entered into in good faith by the parties on both sides, dealing at arms length and specifically limits the Claimant's liability to $350,000.00. To now agree, as the State is asking this Court to do, that the vessel be reappraised and the Claimant be required to increase the amount of the stipulation or deliver the vessel for forfeiture would have the effect of increasing their liability from $350,000.00 by the amount of any principal payments made and any appreciation in value of the vessel, on the one hand, or to

accede to the State's demand for forfeiture which would increase the limit of their liability to the value of their equity plus the balance due to the U.S. Government on the preferred mortgage, and which according to the estimates of the State could amount to a total of $1.3 to $1.5 million dollars. This would be unconscionable!

IT IS THEREFORE ORDERED that pursuant to the Findings of Fact, Conclusions of Law and Memorandum Decision and Opinion entered herein on the 1st day of December, 1977, the vessel F/V American Eagle with all her onboard gear and the proceeds of fish tickets E95626 and E95627 be and the same are hereby forfeited to the State of Alaska and the Claimants have twenty (20) days in which to make payment to the extent of

their liability before Judgment may, on the Motion be entered on the bond for the amount therein stated.

DATED this 9th day of February, 1978 at Kodiak Alaska.

s/
ROY H. MADSEN, SUPERIOR COURT JUDGE

CC: All parties

SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT KODIAK

STATE OF ALASKA Plaintiff, vs. THE F/V AMERICAN EAGLE, ADF&G No. 39 and $100,677.50 Representing the Proceeds of 143,825 lbs. of Alaska King Crab Delivered Pursuant to ADF&G Fish Ticket Nos. E95626, E95627, Defendants.	NO. 76-16023

FINDINGS OF FACT, CONCLUSIONS OF LAW
MEMORANDUM OPINION AND DECISION

This is civil action for the forfeiture of the F/V American Eagle together with all her on-board equipment at the time of her seizure and the proceeds of fish tickets E 95626 and E 95627 which represent a catch of King Crab which was on board at the time of seizure and which is alleged in the Complaint to have been taken by the American Eagle in an area closed to commercial fishing at the time of such taking.

FINDINGS OF FACT

1. The American Eagle with all her on-board gear was seized at Pelican, Alaska on or about January 16, 1976.
2. King Crab which was on board the American Eagle in the approximate amount of 143,825#, represented by Fish Tickets #95626 and E95627 was also seized at that time.
3. Both the vessel and crab were seized pursuant to AS 16.05.190-195 and the Plaintiff is asking that they be forfeited to the State.
4. On or about July 29, 1975 the American Eagle was registered at Unalaska, Alaska for King Crab Registration Area "O" (5AAC. 34.600).
5. On or about December 2, 1975 at Unalaska, Alaska, the American Eagle was registered to fish in the Western District of King Crab Registration Area "O".

6. That by Westward Region Emergency Order No. 20, the Egg Island District of King Crab Registration Area "O" was closed to the taking of King Crab at twelve (12) noon, November 7, 1975.

7. That on or about January 2, 1976 the American Eagle was observed from a U.S.C.G. plane flying Foreign Fisheries Patrol. Said plane passed by the American Eagle at an altitude of 150-200 feet, approximately 150 yards distant on the port side of the vessel. The name of the vessel was observed, the vessel was observed to be fishing, i.e., there were two men on the aft part of the vessel and a crab pot was observed extending part way out of the water. Further, a line of crab pot buoys was seen (approximately ten) extending from N.E. to S.W. to the stern or back of the vessel. That said

sighting was within the Egg Island District of King Crab Registration Area "O".

8. That on or about January 5, 1976 the American Eagle was observed from a Japanese factory stern trawler, the Chikubu Maru, the sighting was called to the attention of a National Marine Fisheries agent on board at the time as the vessel was making its way through some King Crab gear, that the sighting of the American Eagle and a string of crab pot buoys approximately twenty (20) to fifty (50) pots, that another vessel, the Golden Viking, was sighted in the same vicinity and that this sighting took place in the Egg Island District of King Crab Registration Area "O".

9. That on January 7th a vessel and King Crab gear were observed in the Egg

Island District by a plane which sighting was reported to Fish and Wildlife Protection. Fish and Wildlife Protection chartered a vessel which proceeded to the Egg Island District from Dutch Harbor. Fish and Wildlife Protection Officers on board observed lights of three vessels, which lights were extinguished. Eight sets of buoys marked American Eagle and #39, the registration number of the American Eagle, were observed, all in the Egg Island District. One pot was pulled and found to be baited, fishing and with live King Crab in it.

10. That the King Crab fishery is a highly sophisticated operation, the vessels such as the American Eagle being 80 feet or more in length and being equipped with sophisticated electronic equipment such as two radars, two or

more radios, depth finders, loran, etc.

11. That although crab fishing is a highly lucrative business requiring modern and sophisticated vessels and electronic equipment and crab pots generally cost several hundred dollars each when equipped with lines and buoys, and skipper of the American Eagle says he lost fourteen (14) in the Egg Island District, he also testified that the did not keep a log indicating where he dropped his pots, how many, nor did he keep records of courses, distances, pot numbers, or pot locations. All he entered in his log were such notations as arrival time at Dutch Harbor, refueling, unloading of crab, departure time. No reference was made in the log to loss of pots or possible location.

12. That there is an identity of interest in the vessels American Eagle and Golden Viking, the skipper of the American Eagle being owner of one-third interest in it and one-half interest in the Golden Viking.

13. That the American Eagle has approximately three hundred (300) pots which are used in the King Crab fishery, some being fished and some being stored in shallow water.

14. That the American Eagle was in the Egg Island District about three (3) days in January, 1976, about January 2, 5, & 7th; although it was then allegedly fishing in the Western District.

15. That the trip to the Egg Island District from the Western District, where the American Eagle was allegedly fishing, would have taken about six (6) hours each way and the three trips to the Egg Island District, allegedly

to look for lost pots, would have consumed thirty-six (36) hours of running time. No "lost pots" were found or recovered.

16. That the American Eagle sighted other pots, not their own, in the Egg Island District but did not contact the vessel to whom they belonged, although this is customary procedure when pots are found belonging to other vessels.

17. Although the American Eagle was in the Egg Island District on January 2nd and 5th, they did not see the U.S.C.G. plane nor the Japanese trawler that observed them as referred to in Paragraphs #7 and #8 of these Findings of Fact.

18. That there is a distinct size difference between the crab taken from the Egg Island District and those taken from the Western District; those taken from the Egg Island District averaging

7 lbs. and 155 to 157 MM across the carapace and those taken from the Western District averaging 10 lbs. and 180 MM across the carapace. That there is on the average a 20 - 25 MM or 1-1/2" difference in size and a two to three pound (2 - 3 lb.) difference in weight.

19. That 5,843 crab taken from the American Eagle in Pelican were measured and the average size was 157 MM. That other samplings from the Egg Island District taken, one consisting of 995 crab, average 157 MM and another of 788 crab averaged 157 MM.

20. That samples taken from the Western District of 244 crab averaged 180 MM and another of 92 crab averaged 180 MM.

21. That the American Eagle delivered 127,599 lbs. of King Crab from the Egg

Island District during the period that area was open to fishing and an added 20,186 lbs. which was split between the Egg Island District and the Akun District which crab averaged 7.2. lbs.

22. That on approximately January 16th a Fish and Wildlife Protection Officer surveyed an area south of Akutan Island, where gear belonging to the American Eagle was sighted, specifically twenty-seven (27) buoys with ADF&G #39 and American Eagle on them which were stored in shallow water. Of these twenty-seven (27) buoys, seven (7) of them matched numbers which had been observed by this officer in the Egg Island District on January 7th & 8th and of which was pulled as stated in Paragraph # 9 of these Findings.

CONCLUSIONS OF LAW

Recognizing the fact that forfeitures even when civil in form, are basically criminal in nature (Graybill v. State 545 P2d 629 (631) Alaska 1976, the Court, after having heard and weighing the testimony of the witnesses and the exhibits finds that the State has met its burden by clearly and convincingly proving by a preponderance of the evidence that

(1) The Egg Island District of Area "O" King Crab Registration District was closed to the taking of King Crab at twelve (12) noon, November 7, 1975,

(2) That the F/V American Eagle was used in aid of the violation of Chapter 34 of the Alaska Administrative Code by taking and possessing King Crab within the Egg Island District between January 2 - 7th, 1976, while said district was closed to commercial crab fishing and said taking was prohibited

by 5 AAC 34.098, 5 AAC 34.090(a) and AS16.10.200,

(3) That the crab so taken are contraband,

IT IS THEREFORE THE ORDER of the Court that the F/V American Eagle with all her on-board gear be and the same is forfeited to the State of Alaska and the proceeds of fish tickets E95626 and E95627 which represent the King Crab caught by said vessel in violation of the Alaska Administrative Code and statutes aforementioned be and they are hereby forfeited to the State of Alaska pursuant to AS 16.05.195.

DATED this 1st day of December, 1977 at Kodiak, Alaska.

s/
ROY H. MADSEN, SUPERIOR COURT JUDGE

APPENDIX C

IN THE TRIAL COURTS FOR THE
STATE OF ALASKA
THIRD JUDICIAL DISTRICT
AT KODIAK

STATE OF ALASKA	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
KONRAD S. URI,	)	No. 74-12228 Cr. Kodiak
PER NYMARK,	)	No. 74-12231 Cr. Kodiak
ARNOLD RASMUSSEN,	)	No. 74-12217 Cr. Kodiak
RONALD BEIRNES,	)	No. 74-12222 Cr. Kodiak
BORGE H. MANNES,	)	No. 74-12219 Cr. Kodiak
CARL PEROVICH,	)	No. 74-12224 Cr. Kodiak
BJORN NYMARK,	)	No. 74-12221 Cr. Kodiak
SVERRE A. YRI,	)	No. 74-12230 Cr. Kodiak
OLE HENDRICKS,	)	No. 74-12233 Cr. Kodiak
SIGMUND ANDREASSEN,	)	No. 74-12232 Cr. Kodiak
CORY A. KALDESTAD,	)	No. 74-12274 Cr. Kodiak
MICHAEL LYNCH, JR.	)	No. 74-12218 Cr. Kodiak
LARS MYHRE,	)	No. 74-12234 Cr. Kodiak
THOMAS HAUGAN, AND	)	No. 74-12220 Cr. Kodiak
EMIL VINBERG,	)	No. 74-12247 Cr. Kodiak
	)	
Defendants.	)	
	)	

MEMORANDUM DECISION AND
ORDER OF DISMISSAL

This matter having come on regularly before the court for hearing the 16th day of February, 1977, on Defendant's Motion for Dismissal on the grounds and for the reasons that the regulations herein sought

to be enforced against these Defendants are unconstitutionally vague, Plaintiff appearing by and through its attorneys, Gerald W. Markham and John G. Gissberg, and Defendants appearing in person and with their attorneys, William B. Rozell and Douglas M. Fryer, and the Court having read and considered the briefs on the law and having listened to the arguments of counsel and being fully advised in the premises finds:

I. That each of the Defendants is charged essentially with: 1) taking crab during a closed season; 2) unlawful possession of crab; and 3) unlawful possession of crab pots;

II. That the following regulations and statutes must be construed or to some degree pertain to the interpretation of the offenses charged and/or the State's authority therefor:

A. 5 AAC 34.005 Statistical Areas
B. 5 AAC 34.090
C. 5 AAC 34.975(13)
D. 5 AAC 34.010
E. 5 AAC 34.035 Closure of Registration Areas
F. 5 AAC 34.095(a)(1)
G. 5 AAC 34.085(a)(3)
H. 5 AAC 34.095 Unlawful Possession of King Crab Pots
I. 5 AAC 34.100,200,300,400,500, 600,700,800
J. 5 AAC 34.900 Statistical Area Q
K. 5 AAC 34.910 Fishing Seasons
L. Emergency Regulations Amending 5 AAC 34.910 Adopted 6/25/74
M. AS 16.05.920
N. AS 16.10.200
O. AS 16.10.180
P. AS 16.10.190

III. 5 AAC 34.005 establishes "Statistical areas" for the King Crab Fishery consisting of (1) a "registration area" comprised of all the waters within the statistical areas which are subject to the jurisdiction of the State; and 2) an adjacent seaward biological influence zone, comprised of all the waters within the statistical area <u>which are not part of the registration area</u>.

Waters of Alaska re defined as those extending three miles seaward in 5 AAC 39.975(13) and International waters are defined as those outside Alaska's three-mile limit in 5 AAC 36.010. It is undisputed that the Board of Fish and Game had the authority to promulgate rules and regulations necessary to conserve crab existing within the State even though such rules would regulate the taking of crab outside the State's borders. State v. Bundrant, 546 P.2d 530; AS 16.10.190. The only limitations on such regulations of extra-territorial activity was that the prohibited conduct was to be based on conservation principles inherent on the resources migratory characteristics and not based on "artificial boundaries or political circumstances".

An examination of the description of areas AD to P reveals in each instance a clearly defined area which terminates to

the seaward at a specified depth curve, and, therefore, these described areas are easily located.

The description of Area Q, however, has no seaward termination point; rather, it extends throughout or covers the whole of the Bearing and Chukchi Seas, and indeed as argued by the State before this Court, extends from the Alaskan shore to those of Siberia.

Now, in examining 5 AAC 34.005, it appears that the statistical areas as described includes "registration areas" and "the adjacent biological influence zone". The regulation 5 AAC 34.035, which authorizes the closing of registration areas, does so in each registration area so it would appear that in order to determine where a season is opened or closed, one must be able to identify the registration area to which that particular opening or closing applies.

This is where Statistical Area Q becomes vague. Where within that area is the "Registration Area"? Where is the season opened or closed? Where is the line of demarcation? Does it extend 3 miles? 30? 60? 100? 200? or as the State has argued, does it have no boundary except the shores of a foreign country bounding the opposite side of the Sea? The crucial question before the Court is whether it is clear and unambiguous, or, as the Defendants have argued, vague? I would have to agree with the Defendants that the language is vague and imprecise; and the description of the area to be delineated uncertain to the point where the regulation can be enforced at the whim and fancy of the enforcement agent, according to that individual's interpretation. As our Supreme Court stated in Theodore v. State, 407 P.2d 182:

> a vague, imprecise, indefinite, or ambiguous regulation, the breach of which carries a criminal penalty, should be strictly construed in favor of the accused.

I find that Statistical Area and Registration Area are not synonymous terms; a Statistical Area "encompasses" a Registration Area and, in addition thereto, also encompasses an adjacent seaward biological influence zone, which is "not" a part of the registration area.

I further find that 5 AAC 34.035 governs the opening and closing of fishing seasons in Registration Areas only, not in statistical areas; therefore, Registration Areas should be specifically described or 5 AAC 34.035 should be amended to apply to the opening and closing of seasons in "Statistical Areas".

For these reasons, I find that as in Wacek v. State, 530 P.2d 751, these defendants were denied due process of law in that

inadequate notice was given by 5 AAC 34.900 delineating the "Registration Area" in Statistical Area Q to which the season in 5 AAC 34.910 Emergency Closing was to apply; and, therefore, the Complaints as to these defendants are hereby dismissed.

DATED at Kodiak, Alaska, this 28th day of February, 1977.

ROY H. MADSEN
SUPERIOR COURT JUDGE

cc: Gissberg
Markham
Rozell
Fryer
Dept/P.S.
AST

APPENDIX H

IN THE SUPERIOR COURT FOR THE
STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT KODIAK

STATE OF ALASKA,	)
	)
Plaintiff,	)
	)
vs.	)
	)
The F/V QUINHAGAK, a white crab vessel bearing Alaska Department of Fish and Game (hereinafter ADF&G) No. 3645, together with all her onboard equipment, a fish ticket bearing ADF&G No. E-52031 representing 56,361 lbs. of KING CRAB, CORY A. KALDESTAD and GOLDEN NORTH FISHERIES, INC.,	)
	)
Defendant.	)
	)

No. 74-16253 H

MEMORANDUM DECISION AND ORDER OF DISMISSAL

Defendant's Motion to Dismiss having come on regularly before the Court for hearing, the Court having considered the memorandums of the parties and being fully advised in the premises finds:

This is an action for forfeiture of the proceeds of crab represented by a fish ticket bearing ADF&G No. E-52031, pursuant to the provisions of A.S. 16.05. 195.

The facts through which this action arose are essentially the same as those under which certain criminal actions were filed entitled State of Alaska vs. Uri, et al 74-12223 Cr. - Kodiak, which cases were dismissed by Order of this Court dated February 23, 1977.

The reason stated for the dismissal being that the definition of Statistical Area Q, i.e. 5 AAC 34.900 is vague and

imprecise and the description of the area to be delineated uncertain to the point where the regulation can be enforced at the whim and fancy of the enforcement agent, according to that individual's interpretation.

Although this is a civil action, our Supreme Court has held that "forfeiture actions are considered penal in nature and therefore like other penal statutes they should be strictly construed against the government or parties seeking to exact statutory penalties and in favor of persons on whom such penalties are sought to be imposed." One Cocktail Glass, etc. Op. #1437, 6-8-77; Grayhill v. State 545 P2d 629.

The same principles of notice would apply in a civil case as well as a criminal proceeding and, therefore, I find that this action cannot be sustained for lack of due process of law, in that inadequate notice was given by 5 ACC 34.900 delineating the "Registration Area" in Statistical Area Q to which the season in 5 AAC 34.910 Emergency Closing was to apply and, therefore, the Complaint is dismissed.

DATED at Kodiak, Alaska this 25th day of August, 1977.

ROY H. MADSEN, SUPERIOR COURT JUDGE

cc: John G. Gissberg, Asst. A.G.
Phillip J. Eide, Esq.

IN THE SUPERIOR COURT FOR THE
STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT KODIAK

STATE OF ALASKA,

Plaintiff,

vs.

The F/V QUINHAGAK, a white crab vessel bearing Alaska Department of Fish and Game (hereinafter ADF&G) No. 3645, together with all her onboard equipment, a fish ticket bearing ADF&G No. E-52031 representing 56,361 lbs. of KING CRAB, CORY A. KALDESTAD and GOLDEN NORTH FISHERIES, INC.,

Defendant.

No. 74-16253 H

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DATED at Kodiak, Alaska this 25th day of August, 1977.

ROY H. MADSEN, SUPERIOR COURT JUDGE

cc: John G. Gissberg, Asst. A.G.
Phillip J. Eide, Esq.

APPENDIX I

CONSTITUTIONAL PROVISIONS, STATUTES, TREATIES AND REGULATIONS INVOLVED IN THE CASE

CONSTITUTION OF THE UNITED STATES

Article I, Section 8

The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States; . . .

To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

Article VI, Clause 2

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every

state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

Fourteenth Amendment, Section 1

Citizenship rights not to be abridged by states. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FEDERAL ACTS

Alaska Statehood Act (July 7, 1958)

72 Stat. 339

Sec. 6(m) The Submerged Lands Act of 1953 (Public Law 31, Eighty-third Congress, first session; 67 Stat. 29) shall be applicable to the State of Alaska and the said State shall have the same rights as do existing States thereunder.

Submerged Lands Act (May 22, 1953)

43 USC § 1301-1315

43 USC 1301(a) The term "lands beneath navigable waters" means--

***

(2) all lands permanently or periodically covered by tidal water up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or

into the Gulf of Mexico) beyond three geographical miles, and

(3) all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters, as hereinabove defined;

(b) The term "boundaries" includes the seaward boundaries of a State or its boundaries in the Gulf of Mexico or any of the Great Lakes as they existed at the time such State became a member of the Union, or as heretofore approved by the Congress, or as extended or confirmed pursuant to section 1312 of this title but in no event shall the term "boundaries" or the term "lands beneath navigable waters" be interpreted as extending from the coast line more than three geographical miles into the Atlantic Ocean or the Pacific Ocean, or more than three marine leagues into the Gulf of Mexico;

(c) The term "coast line" means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters;

***

(e) The term "natural resources" includes, without limiting the generality thereof, oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life but does not include water power, or the use of water for the production of power;

***

(g) The term "State" means any State of the union;

43 USC 1302. Resources seaward of the Continental Shelf.

Nothing in this chapter shall be deemed to affect in any wise the rights of the United States to the natural resources

of that portion of the subsoil and seabed of the Continental Shelf lying seaward and outside of the area of lands beneath navigable waters, as defined in section 1301 of this title, all of which natural resources appertain to the United States, and the jurisdiction and control of which by the United States is confirmed. May 22, 1953, c. 65, Title II, § 9, 67 Stat. 32.

43 USC 1311. Rights of the States--Confirmation and establishment of title and ownership of lands and resources; management, administration, leasing, development and use

(a) It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said

lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof;

(b) (1) The United States releases and relinquishes unto said States and persons aforesaid, except as otherwise reserved herein, all right, title, and interest of the United States, if any it has, in and to all said lands, improvements, and natural resources; . . .

***

(d) Nothing in this chapter shall affect the use, development, improvement, or control by or under the constitutional

authority of the United States of said lands and waters for the purposes of navigation or flood control or the production of power, or be construed as the release or relinquishment of any rights of the United States arising under the constitutional authority of Congress to regulate or improve navigation, or to provide for flood control, or the production of power; . . .

43 USC § 1312. Seaward boundaries of States

The seaward boundary of each original coastal State is approved and confirmed as a line three geographical miles distant from its coast line or, in the case of the Great Lakes, to the international boundary. Any State admitted subsequent to the formation of the Union which has not already done so may extend its seaward boundaries to a line three geographical

miles distant from its coast line, or to the international boundaries of the United States in the Great Lakes or any other body of water traversed by such boundaries. Any claim heretofore or hereafter asserted either by constitutional provision, statute, or otherwise, indicating the intent of a state so to extend its boundaries is approved and confirmed, without prejudice to its claim, if any it has, that its boundaries extend beyond that line. Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State's seaward boundary beyond three geographical miles if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress. May 22, 1953, c. 65, Title II, § 4, 67 Stat. 31.

43 USC § 1314. Rights and powers retained by the United States; purchase of natural resources; condemnation of lands

(a) The United States retains all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership, or the rights of management, administration, leasing, use, and development of the lands and natural resources which are specifically recognized, confirmed, established, and vested in and assigned to the respective States and others by section 1311 of this title.

Outer Continental Shelf Lands Act

(August 7, 1953)

43 USC 1331-1343

43 USC 1331. Definitions

When used in this subchapter--

(a) The term "outer Continental Shelf" means all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in section 1301 of this title, and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control;

(b) The term "Secretary" means the Secretary of the Interior;

43 USC 1332. Congressional declaration of policy; jurisdiction; construction

(a) It is declared to be the policy of the United States that the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and

power of disposition as provided in this subchapter.

(b) This subchapter shall be construed in such manner that the character as high seas of the waters above the outer Continental Shelf and the right to navigation and fishing therein shall not be affected. Aug. 7, 1953, c. 345, § 3, 67 Stat. 462.

§ 1333. Laws and regulations governing lands--Constitution and United States laws; laws of adjacent States; publication of projected States lines; restriction on State taxation and jurisdiction

(a)(1) The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands and fixed structures which may be erected thereon for

the purpose of exploring for, developing, removing, and transporting resources therefrom, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State: Provided, however, That mineral leases on the outer Continental Shelf shall be maintained or issued only under the provisions of this subchapter.

(2) To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State as of August 7, 1953 are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if

its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States. State taxation laws shall not apply to the outer Continental Shelf.

(3) The provisions of this section for adoption of State law as the law of the United States shall never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose over the seabed and subsoil of the outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom.

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43 USC 1334. Administration of leasing--Rules and regulations; amendment; cooperation with State agencies; violations and penalties; compliance with regulations as condition of lease

(a)(1) The Secretary shall administer the provisions of this subchapter relating to the leasing of the outer Continental Shelf, and shall prescribe such rules and regulations as may be necessary to carry out such provisions. The Secretary may at any time prescribe and amend such rules and regulations as he determines to be necessary and proper in order to provide for the prevention of waste and conservation of the natural resources of the outer Continental Shelf, and the protection of correlative rights therein, and, notwithstanding any other provisions herein, such rules and regulations shall apply to all operations

conducted under a lease issued or maintained under the provisions of this subchapter. In the enforcement of conservation laws, rules, and regulations the Secretary is authorized to cooperate with the conservation agencies of the adjacent States. Without limiting the generality of the foregoing provisions of this section, the rules and regulations prescribed by the Secretary thereunder may provide for the assignment or relinquishment of leases, for the sale of royalty oil and gas accruing or reserved to the United States at not less than market value, and, in the interest of conservation, for unitization, pooling, drilling agreements, suspension of operations or production, reduction of rentals or royalties, compensatory royalty agreements, subsurface storage of oil or gas in any of said submerged lands, and drilling or other easements necessary for operations or production.

(2) Any person who knowingly and willfully violates any rule or regulation prescribed by the Secretary for the prevention of waste, the conservation of the natural resources, or the protection of correlative rights shall be deemed guilty of a misdemeanor and punishable by a fine of not more than $2,000 or by imprisonment for not more than six months, or by both such fine and imprisonment, and each day of violation shall be deemed to be a separate offense. The issuance and continuance in effect of any lease under the provisions of this subchapter shall be conditioned upon compliance with the regulations issued under this subchapter and in force and effect on the date of the issuance of the lease if the lease is issued under the provisions of section 1337 of this title, or with the regulations issued under the provisions of section 1335(b) (2) of this

title if the lease is maintained under the provisions of section 1335 of this title.

Cancellation of lease; judicial review

(b)(1) Whenever the owner of a nonproducing lease fails to comply with any of the provisions of this subchapter, or of the lease, or of the regulations issued under this subchapter and in force and effect on the date of the issuance of the lease if the lease is issued under the provisions of section 1337 of this title, or of the regulations issued under the provisions of section 1335 (b)(2) of this title, if the lease is maintained under the provisions of section 1335 of this title, such lease may be canceled by the Secretary, subject to the right of judicial review as provided in section 1337(j) of this title, if such default continues for the period of thirty days after mailing of notice by registered letter to the lease owner at his record post office address.

(2) Whenever the owner of any producing lease fails to comply with any of the provisions of this subchapter, or of the lease, or of the regulations issued under this subchapter and in force and effect on the date of the issuance of the lease if the lease is issued under the provisions of section 1337 of this title, or of the regulations issued under the provisions of section 1335(b)(2) of this title, if the lease is maintained under the provisions of section 1335 of this title, such lease may be forfeited and canceled by an appropriate proceeding in any United States district court having jurisdiction under the provisions of section 1333(b) of this title.

Prohibition of Foreign Fishing Vessels in the Territorial Waters of the United States (16 USC 1081-1085 [1964]) (Repealed March 1, 1977)

16 USC 1081. Prohibition against fishing in territorial waters; exceptions

It is unlawful for any vessel, except a vessel of the United States, or for any master or other person in charge of such a vessel, to engage in the fisheries within the territorial waters of the United States, its territories and possessions and the Commonwealth of Puerto Rico, or within any waters in which the United States has the same rights in respect to fisheries as it has in its territorial waters or in such waters to engage in activities in support of a foreign fishery fleet or to engage in the taking of any Continental Shelf fishery resource which appertains to the United States except as provided in this chapter or as expressly provided by an international agreement to which the United States is a party. However, sixty days after written notice to the President of the Senate and the Speaker of the House of Representatives of intent to do so, the

Secretary of the Treasury may authorize a vessel other than a vessel of the United States to engage in fishing for designated species within the territorial waters of the United States or within any waters in which the United States has the same rights in respect to fisheries as it has in its territorial waters or for resources of the Continental Shelf which appertain to the United States upon certification by the Secretaries of State and of Commerce that such permission would be in the national interest and upon concurrence of any State, Commonwealth, territory, or possession directly affected. The authorization in this section may be granted only after a finding by the Secretary of Commerce that the country of registry, documentation, or licensing extends substantially the same fishing privileges for a fishery to vessels of the United States. Notwithstanding

any other provision of law, the Secretary of State, with the concurrence of the Secretaries of the Treasury and of Commerce, may permit a vessel, other than a vessel of the United States, owned or operated by an international organization of which the United States is a member, to engage in fishery research within the territorial waters of the United States or within any waters in which the United States has the same rights in respect to fisheries as it has in its territorial waters, or for resources of the Continental Shelf which appertain to the United States and to land its catch in a port of the United States in accordance with such conditions as the Secretary may prescribe whenever they determine such action is in the national interest.

Historical Note--Transfer of Functions. Secretary of Commerce was substituted for Secretary of the Interior in view of: the

creation of the National Oceanic and Atmospheric Administration in the Department of Commerce and the Office of Administrator of such Administration; the abolition of the Bureau of Commercial Fisheries in the Interior Department and the office of Director of such Bureau; transfers of functions, including functions formerly vested in law in the Secretary of the Interior or the Interior Department which were administered through the Bureau of Commercial Fisheries or were primarily related to such Bureau, exclusive of certain enumerated functions with respect to Great Lakes fishery research, Missouri River Reservoir research, Gulf Breeze Biological investigations; and transfer of marine sport fish program of Bureau of Sport Fisheries and Wildlife by 1970 Reorg. Plan No. 4, eff. Oct. 3, 1970, 35 F.R.

Appendix to Title 5, Government Organization and Employees.

16 USC 1085. Definitions

(a) As used in this chapter, the term "Continental Shelf fishery resource" means living organisms belonging to sedentary species; that is to say, organisms, which at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil of the Continental Shelf, including the following species:

CRUSTACEA

Tanner Crab--Chionoecetes tanneri;
Tanner Crab--Chionoecetes opilio;
Tanner Crab--Chionoecetes angulatus;
Tanner Crab--Chionoecetes bairdi;
King Crab--Paralithodes camtschatica;
King Crab--Paralithodes platypus;
King Crab--Paralithodes brevipes;
Stone Crab--Menippe mercenaria;
Lobster--Homarus Americanus;
Dungeness Crab--Cancer magister;
California King Crab--Paralithodes californiensis;
Golden King Crab--Lithodes aequispinus;
Northern Stone Crab--Lithodes maia;

Stone Crab--Menippe mercenaria; and
Deep-sea Red Crab--Ceryon quinquedens.

MOLLUSKS

Red Abalone--Haliotis rufescens;
Pink Abalone--Haliotis corrugata;
Japanese Abalone--Haliotis kamtschatkana;
Queen Conch--Strombus gigas;
Surf Clam--Spisula solidissima; and
Ocean Quahog--Artica islandica.

SPONGES

Glove Sponge--Hippiospongia canaliculata;
Sheepswool Sponge--Hippiospongia lachne;
Grass Sponge--Spongia graminea;
Yellow Sponge--Spongia barbera.

(b) The Secretary of Commerce, in consultation with the Secreary of State, is authorized to publish in the Federal Register additional species of living organisms covered by the provisions of subsection (a) of this section.

(c) As used in this chapter, the term "fisheries" means the taking, planting, or cultivation of fish, mollusks, crustaceans, or other forms of marine animal or plant life by any vessel or vessels; and the term

"fish" includes mollusks, crustaceans, and all other forms of marine animal or plant life.

(d) As used in this chapter, the term "Continental Shelf" refers (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 meters or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.

Fisheries Zone Contiguous to Territorial Sea of United States (16 USC 1091-94 [1966]) (Repealed March 1, 1977)

16 USC 1091. Establishment; fisheries rights

There is established a fisheries zone contiguous to the territorial sea of the United States. The United States will exercise the same exclusive rights in

respect to fisheries in the zone as it has in its territorial sea, subject to the continuation of traditional fishing by foreign states within this zone as may be recognized by the United States.

16 USC 1092. Description of boundaries

The fisheries zone has as its inner boundary the outer limits of the territorial sea and as its seaward boundary a line drawn so that each point on the line is nine nautical miles from the nearest point in the inner boundary.

16 USC 1094. State jurisdiction over natural resources and waters

Nothing in this chapter shall be construed as extending the jurisdiction of the States to the natural resources beneath and in the waters within the fisheries zone established by this chapter or as diminishing their jurisdiction to such resources beneath and in the waters of the territorial seas of the United States.

FISHERY CONSERVATION AND MANAGEMENT ACT OF 1976 (16 U.S.C. § 1801-82 (Effective Mar. 1, 1977)

§ 1802. Definitions

As used in this chapter, unless the context otherwise requires--

(4) the term "Continental Shelf fishery resources" means the following:

COLENTERATA

Bamboo Coral--Acanella spp.;
Black Coral--Antipathes spp.;
Gold Coral--Callagorgia spp.;
Previous Red Coral--Corallium spp.;
Bamboo Coral--Keratoisis spp.; and
Gold Coral--Parazoanthus spp.

CRUSTACEA

Tanner Crab-Chionoecetes tanneri;
Tanner Crab--Chionoectes opilio;
Tanner Crab--Chionecetes angulatus;
Tanner Crab--Chionoecetes bairdi;
King Crab--Paralithodes camtschatica;
King Crab--Paralithodes platypus;
King Crab--Paralithodes brevipes;
Lobster--Homarus americanus;
Dungeness Crab--Cancer magister;
California King Crab--paralithodes californiensis;
California King Crab--paralithodes rathbuni;
Gold King Crab--Lithodes aequispinus;
Northern Stone Crab--Lithodes maja;
Stone Crab--Menippe mercenaria; and
Deep-sea Red Crab--Geryon quinquedens.

§ 1811 Fishery conservation zone

There is established a zone contiguous to the territorial sea of the United States to be known as the fishery conservation zone. The inner boundary of the fishery conservation zone is a line coterminous with the seaward boundary of each of the coastal States, and the outer boundary of such zone is a line drawn in such a manner that each point on it is 200 nautical miles from the baseline from which the territorial sea is measured.

§ 1812 Exclusive fishery management authority

The United States shall exercise exclusive fishery management authority, in the manner provided for in this chapter, over the following:

(1) All fish within the fishery conservation zone.

(2) All anadromous species throughout the migratory range of each such species beyond the fishery conservation zone; except that such management authority shall not extend to such

species during the time they are found within any foreign nation's territorial sea or fishery conservation zone (or the equivalent), to the extent that such sea or zone is recognized by the United States.

(3) All Continental Shelf fishery resources beyond the fishery conservation zone.

Presidential Proclamation, September 28, 1945, Regarding the Continental Shelf

WHEREAS it is the view of the Government of the United States that the exercise of jurisdiction over the natural resources of the subsoil and seabed of the continental shelf by the contiguous nation is reasonable and just, since the effectiveness of measures to utilize or conserve these resources would be contingent upon cooperation and protection from the shore, since the continental shelf may be regarded as an extension of the land-mass of the coastal nation and thus naturally appurtenant to it, since these resources frequently form a seaward extension of a pool or deposit lying within the territory, and

since self-protection compels the coastal nation to keep close watch over activities off its shores which are of the nature necessary for utilization of these resources;

NOW, THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, do hereby proclaim the following policy of the United States of America with respect to the natural resources of the subsoil and seabed of the continental shelf.

Having concern for the urgency of conserving and prudently utilizing its natural resources, the Government of the United States regards the natural resources of the subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control. In cases where the continental shelf extends to the shores of another

State, or is shared with an adjacent State, the boundary shall be determined by the United States and the State concerned in accordance with equitable principles. The character as high seas of the waters above the continental shelf and the right to their free and unimpeded navigation are in no way thus affected.

Executive Order No. 9633, 28 Sept. 1945
1945 AMC 1367, 10 Federal Register 12305

TREATIES

Convention on the Continental Shelf (1958)

Article 1

For the purpose of these articles, the term "continental shelf" is used as referring (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas;

(b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.

Article 2

1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.

2. The rights referred to in paragraph 1 of this article are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities, or make a claim to the continental shelf, without the express consent of the coastal State.

3. The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.

4. The natural resources referred to in these articles consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species; that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil.

Article 3

The rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters as high seas, or that of the airspace above those waters.

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Article 5

1. The exploration of the continental shelf and the exploitation of its natural resources must not result in any unjustifiable interference with navigation, fishing

or the conservation of the living resources of the sea, nor result in any interference with fundamental oceanographic or other scientific research carried out with the intention of open publication.

Ratified by United States 1960
Ratified by USSR 1961

ALASKA STATUTES

Sec. 16.05.190. Seizure without warrant and confiscation by court. Guns, traps, nets, fishing tackle, boats, airplanes, automobiles or other vehicles, sleds, and other paraphernalia used in or in aid of a violation of this chapter, or rule or regulation of the department may be seized under a valid search, and all fish and game, or parts of fish and game, or nests or eggs of birds, taken, transported, or possessed contrary to the provisions of this chapter, or rule or regulation of the department shall be seized by any person designated in § 150 of this chapter. Upon

conviction of the offender or upon judgment of the court having jurisdiction that the item was taken, transported, or possessed in violation of this chapter or rule or regulation of the department, all fish and game, or parts of them are forfeited to the state and shall be disposed of as directed by the court. If sold, the proceeds of the sale shall be transmitted to the proper state officer for deposit in the general fund. Guns, traps, nets, fishing tackle, boats, aircraft, or other vehicles, sleds, and other paraphernalia seized under the provisions of this chapter, or rule or regulation of the department, unless forfeited by order of the court, shall be returned, after completion of the case and payment of the fine, if any. (§ 23 art I ch 94 SLA 1959)

Sec. 16.05.195. Forfeiture of equipment. (a) Guns, traps, nets, fishing gear, vessels, aircraft, other motor vehicles,

sleds, and other paraphernalia or gear used in or in aid of a violation of this title, or regulation promulgated under this title, and all fish and game or parts of fish and game or nests or eggs of birds taken, transported or possessed contrary to the provisions of this title, or regulation promulgated under it, may be forfeited to the state

(1) upon conviction of the offender in a criminal proceeding of a violation of this title in a court of competent jurisdiction; or

(2) upon judgment of a court of competent jurisdiction in a proceeding in rem that an item specified above was used in or in aid of a violation of this title or a regulation promulgated under it.

(b) Items specified in (a) of this section may be forfeited under this section

regardless of whether they were seized before instituting the forfeiture action.

(c) An action for forfeiture under this section may be joined with an alternative action for damages brought by the state to recover damages for the value of fish and game or parts of them or nests or eggs of birds taken, transported or possessed contrary to the provisions of this title or a regulation promulgated under it.

(d) It is no defense that the person who had the item specified in (a) of this section in possession at the time of its use and seizure has not been convicted or acquitted in a criminal proceeding resulting from or arising out of its use.

(e) No forfeiture may be made of an item subsequently sold to an innocent purchaser in good faith. The burden of proof as to whether the purchaser purchased

the item innocently and in good faith shall be on the purchaser.

(f) An item forfeited under this section shall be disposed of at the discretion of the department. (§ 3 ch 124 SLA 1974)

Sec. 16.10.200. Unlawful taking prohibited. It is unlawful for a person taking migratory fish and migratory shellfish in high sea areas designated by the board or in violation of the rules and regulations promulgated by the board governing the taking of migratory fish and migratory shellfish in the designated areas to possess, sell, offer to sell, barter, offer to barter, give or transport in the state, including the waters of the state, migratory fish or migratory shellfish.

Sec. 16.210. Unlawful sale or offer prohibited. It is unlawful for a person to possess, purchase, offer to purchase, sell,

or offer to sell in the state migratory fish or migratory shellfish taken on the high seas knowing that they were taken in violation of a rule or regulations promulgated by the board governing the taking of migratory fish or migratory shellfish in certain areas designated by the board or the commissioner.

Sec. 16.10.220. Penalties for violation of §§ 200 and 210 of this chapter. A person who violates §§ 200 and 210 of this chapter is guilty of a misdemeanor, and upon conviction is punishable by a fine of not more than $5,000, or by imprisonment for not more than one year, or by both.

REGULATIONS OF THE ALASKA BOARD OF FISH AND GAME

REGULATIONS IN EFFECT NOW AND AT ALL RELEVANT TIMES

5 AAC 36.010. DESCRIPTION OF AREA

The International Water area includes all waters outside Alaska's three mile

limit, i.e., beyond those described in 5 AAC 39.975(13).

5 AAC 39.975(13) . . . "waters of Alaska" means the waters north and west of the International Boundary at Dixon Entrance including those extending three miles seaward:

(a) from the coast;

PRE HJELLE V. BROOKS REGULATIONS

5 AAC 07.760 (REPEALED June 15, 1974) QUOTAS

In the king crab fishery, the fishing season will be closed when, during the period June 15 through March 31, a quota of 23,000,000 pounds of king crab has been taken.

5 AAC 36.040 (REPEALED June 15, 1974). TRANSPORTATION AND POSSESSION OF SHRIMP, SCALLOPS AND KING, DUNGENESS OR TANNER CRABS

It is unlawful to possess, sell, offer to sell, barter, offer to barter, give or transport, purchase or offer to purchase within the state, including the waters of

the state any shrimp, scallops or king, dungeness, or tanner crab taken contrary to or in violation of the rules and regulations promulgated by the board, if said shrimp, scallops or crabs are taken in any waters seaward of that officially designated as the territorial waters of Alaska to a depth of 200 meters, or beyond the limit, to where the depth of the superjacent waters admits of the exploitation of these shrimp, scallops or crabs and for the Kodiak and Cook Inlet areas if said shrimp, scallops or crabs are taken in the following waters:

(1) in Kodiak area, an area bounded by a line beginning at the southern entrance of Imuya Bay near Kilokak Rocks to a point southwest of Chirikof Island at 55°31' N. lat., 156°16' W. long., then east to a point of 55°05' W. long., then northeast to a point east of the Barren Islands at

58°52' N. lat., 148° W. long., then west to Cape Douglas at 58°52' N. lat., 153° 15'30" W. long.;

(2) in the Cook Inlet area, an area bounded by a line beginning at Cape Douglas at 58°52' N. lat., 153°15'30" W. long., then east to a point at 58°52' N. lat., 148°50' W. long., then north to Cape Fairfield on the mainland of Alaska.

POST HJELLE V. BROOKS REGULATIONS
(Adopted June 15, 1974
Repealed June 2, 1977)

5 AAC 34.005. STATISTICAL AREAS ESTABLISHED

(a) For the king crab fishery, there are established the following statistical areas with the following code letters:

Code Letter

AD - the waters specified in sec. 100 of this chapter
E - the waters specified in sec. 200 of this chapter
H - the waters specified in sec. 300 of this chapter
K - the waters specified in sec. 400 of this chapter
LM - the waters specified in sec. 500 of this chapter

O - the waters specified in sec. 600 of this chapter
R - the waters specified in sec. 700 of this chapter
S - the waters specified in sec. 800 of this chapter
Q - the waters specified in sec. 900 of this chapter

(b) Each statistical area consists of:

(1) a registration area, comprised of all the waters within the statistical area which are waters subject to the jurisdiction of the state; and

(2) an adjacent seaward biological influence zone, comprised of all the waters within the statistical area which are not part of the registration area.

(c) Registration areas are areas in which the department shall apply conservation and management regulations in order to protect and maintain the king crab resources of the state.

(d) Adjacent seaward biological influence zones are areas which the department shall utilize to obtain biological and

fishing effort data and other information necessary for the formulation of comprehensive and effective conservation and management regulations governing king crab resources inhabiting waters subject to the jurisdiction of the state.

5 AAC 34.035. CLOSURE OF REGISTRATION AREAS

(a) The commissioner shall monitor the condition of king crab stocks in all statistical areas through the use of such data and information as are practically available.

(b) When the commissioner finds that continued fishing effort would jeopardize the viability of king crab within a registration, he shall close the registration area by emergency order.

(c) In determining whether to close a registration area, the commissioner shall consider all appropriate factors to the extent there is information available on

such factors. Factors which may be considered include:

(1) the effect of overall fishing effort within the statistical area encompassing the registration area;

(2) catch per unit of effort and rate of harvest;

(3) relative abundance of king crab within the area in comparison with pre-season expectations of the department;

(4) such guideline harvest levels as may be promulgated by regulation;

. . . .

(6) general information on the condition of king crab within the area; and

(7) information pertaining to the maximum sustainable yield level of king crab within the registration area.

(d) Within five days after the closure of any registration area, the owner of any vessel registered for that

area may formally request the commissioner to reopen the area. The commissioner shall personally review pertinent information on the condition of king crab within the area, and shall formally announce his decision within 14 days of the receipt of the request.

(e) After the closure of any registration area, no vessel registered for that area may bring king crab into waters subject to the jurisdiction of the state unless:

(1) the vessel is validly registered for another registration area and the season is open in the area; and

(2) the vessel is otherwise in compliance with secs. 020 and 030 of this chapter.

5 AAC 34.090. UNLAWFUL POSSESSION OF KING CRAB OR KING CRAB GEAR

(a) It is unlawful for any person to possess unprocessed king crab aboard a

vessel licensed as a commercial fishing vessel within any registration area unless the vessel is validly registered for the area and the season is open, or unless the person is acting pursuant to the authorization of sec. 030(d) of this chapter. This prohibition shall not apply to king crab possessed for subsistence purposes if otherwise consistent with applicable regulations.

(b) It is unlawful for any person to possess aboard a vessel licensed as a comemrcial fishing vessel within any registration area any king crab or any gear (including aggregate amounts of gear) used in the taking of king crab which are prohibited by other regulations in this chapter governing such registration area.

(c) It is unlawful for any person to possess, purchase, sell, barter, or transport king crab within the state or within waters subject to the jurisdiction of the

state if that person knows or has reason to know that such king crab were taken or possessed in contravention of the regulations of this chapter.

5 AAC 34.098. VIOLATION OF REGULATIONS

It is unlawful for any person to violate any of the regulations of this chapter.

5 AAC 34.600. DESCRIPTION OF STATISTICAL AREA

Statistical Area O has as its eastern boundary the longitude of Scotch Cap Light, and as its western boundary 172° west longitude, and its seaward boundaries the 800 fathom depth contour, excluding the waters of statistical area Q.

5 AAC 34.605(c).

Egg Island District: All Pacific Ocean waters of statistical area O east of the longitude of Udagak Strait on Unalaska Island (166°15' W. Long.), south of a line from Erskine Point on Unalaska Island

(53°59' N. Lat., 166°16'45" N. Long.) to Jackass Point on Akun Island (54°06'35" N. Lat., 165°34' W. Long), then to Avatanek Point (54°02'30" N. Lat, 165°17' W. Long.), and west of the longitude of Avatanek Point (154°17(W. Long.) including the waters of Beaver Inlet and Udagak Strait.

5 AAC 34.605(e). DESCRIPTION OF DISTRICTS

e. Western District: all Bering Sea waters or statistical area O west of the longitude of Cape Tanak on Unalaska Island and all Pacific Ocean waters of king crab registration area O west of the longitude of Udagak Strait (166EoD16'40" N. Lat., 168°07' W. Long.), to Konets Head on Unalaska Island, (53°19' N. Lat., 176°51' W. Long.)

5 AAC 34.610. FISHING SEASON

King crab may be taken or possessed from 12:00 noon November 1 through February

15 unless the registration area is closed earlier by emergency order.

5 AAC 34.900. DESCRIPTION OF STATISTICAL AREA

Statistical area Q includes the waters of the Bering Sea and Chukchi Sea including all tributary bays except Bechevin Bay and Isanotski Strait (as described in 5 AAC 34.500), north of 54°36' N. lat., (the latitude of Cape Sarichef).

POST STATE V. URI REGULATIONS
(Adopted June 2, 1977)

5 AAC 34.005 STATISTICAL AREAS ESTABLISHED

(b) Each statistical area consists of:

(1) a registration area, comprised of all the waters within the statistical area which are territorial waters of Alaska; and

(2) an adjacent seaward biological influence zone; comprised of all the waters

within the statistical area which are not part of the registration area.

(d) Adjacent seaward biological influence zones are areas which the department shall utilize to obtain biological and fishing effort data and other information necessary for the formulation of comprehensive and effective conservation and management regulations governing king crab resources inhabiting the registration area. However, regulations governing the registration area will also be applied in the adjacent seaward biological influence zone consistent with sec. 010 of this chapter.

5 AAC 34.010. APPLICATION OF REGULATIONS. (a) Notwithstanding any other provision of this chapter, all regulations in this chapter applicable to a registration area shall be applicable also in its adjacent seaward biological influence zone.

(b) Persons on a vessel navigating within an adjacent seaward biological influence zone shall conduct their operations and activities in full compliance with the regulations applicable to the appurtenant registration area.

(c) The commissioner may suspend the application of this section wholly or partially in any adjacent seaward biological influence zone if he finds that such application:

(1) does not tend to facilitate enforcement of regulations applicable to a registration area;

(2) does not tend to protect or conserve king crab inhabiting territorial waters of Alaska; or

(3) that the state has an insufficient interest in the king crab inhabiting the zone to warrant extension of the jurisdiction of the state to the zone.

5 AAC 34.035. CLOSURE OF REGISTRATION AREAS.

(f) The foregoing provisions of this section are applicable also to closures of districts, subdistricts, sections, or any other portion of a statistical area.

5 AAC 34.091. UNLAWFUL ACTS WITHIN AN ADJACENT SEAWARD BIOLOGICAL INFLUENCE ZONE. It is unlawful for any person:

(1) to take, attempt to take, cause to be taken, or possess king crab;

(2) to operate, attempt to operate or cause to be operated any vessel or gear or to possess any gear; or

(3) to take, attempt to take, cause to be taken, or fail to take any action, in violation of sec. 010(b) of this chapter.

ALASKA COURT

CRIMINAL RULES

Rule 1. Scope.

These rules govern the practice and procedure in the superior court in all criminal proceedings and, insofar as they are applicable, the practice and procedure in all other courts in criminal proceedings. (Effective Aug. 1, 1980.)

Rule 37. Search and Seizure.

(1) A search warrant authorized by law shall issue only on

(i) (aa) affidavit sworn to before a judge or magistrate or any person authorized to take oaths under the law of the state, or

(ii) establishing the grounds for issuing the warrant.

(2) If the judge or magistrate is satisfied that grounds for the application exist or that there is probable cause to

believe that they exist, he shall issue a warrant

(i) identifying the property, and

(ii) naming or describing the person or place to be searched.

(3) The warrant

(i) shall be directed to a peace officer of the state authorized to enforce or assist in enforcing any law thereof, and

(ii) shall state the ground or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof, and

(iii) shall command the officer to search forthwith the person or place named for the property specified; and

(iv) shall direct that it be served between 7:00 a.m. and 10:00 p.m., but if an affiant is positive that the property is on the person or in the place

to be searched, the warrant may direct that it be served at any time, and

(v) shall designate the judge or the magistrate to whom it shall be returned.

(b) Execution and Return With Inventory. The warrant shall be executed and returned within 10 days after its date. The officer taking property under the warrant.

(1) shall give to the person from whom or from whose premises the property was taken a copy of the warrant, a copy of the supporting affidavits, and receipt for the property taken, or

(2) shall leave the copies and the receipt at the place from which the property was taken.

The return shall be made promptly and shall be accompanied by a written inventory of any property taken as a result of the search pursuant to or in conjunction with the warrant. The inventory shall be made

in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be signed by the officer under the penalty of perjury pursuant to AS 09.65.012. The judge or magistrate shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(c) Motion for Return of Property and to Suppress Evidence.

A person aggrieved by an unlawful search and seizure may move the court in the judicial district in which the proeprty was seized or the court in which the property may be used for the return of the

property and to suppress for use as evidence anything so obtained on the ground that the property was illegally seized.

(d) In Camera Hearing. A person who challenges the validity of a search and seizure predicated on information gained from an informant used either in

(1) support of an application for a warrant, or

(2) as the basis of a search without warrant

may move the court for disclosure of the identity of the informant pursuant to Rule 16. In the event the court determines that disclosure of the identity of the informant is not required under Rule 16, the court shall conduct an in camera recorded hearing in which it shall investigate and take evidence so as to determine whether or not a search based on the informant's information was justified. Following the in camera hearing, the court shall grant or

deny the motion to suppress on the record, and shall make written findings concerning the validity of the search based on the informer's information. The written findings, together with the record of the hearing, shall be sealed, and if the validity of the search is upheld the sealed testimony and findings shall, on appeal of a conviction in which evidence of the search was admitted, be transmitted to the supreme court for automatic review of the motion to suppress. (Effective February 15, 1973.)

Rule 45. Speedy Trial.

(a) Priorities in Scheduling Criminal Cases. The court shall provide for placing criminal proceedings upon appropriate calendars. Preference shall be given to criminal proceedings and the trial of defendants in custody shall be given preference over other criminal cases. Trial dates in criminal cases in the

superior court shall be set at the time of arraignment, and if a trial date is thereafter vacated, the trial shall be immediately set for a date certain.

(b) Speedy Trial Time Limits. A defendant charged with a felony, a misdemeanor, or a violation shall be tried within 120 days from the time set forth in paragraph (c) of this rule.

(c) When Time Commences to Run. The time for trial shall begin running, without demand by the defendant, as follows:

(1) From the date the defendant is arrested, initially arraigned, or from the date the charge (complaint, indictment, or information) is served upon the defendant, whichever is first. The arrest, arraignment, or service upon the defendant of a complaint, indictment, or information, relating to subsequent charges arising out of the same conduct, or the refiling of the original charge, shall not extend the time,

unless the evidence on which the new charge is based was not available to the prosecution at the time the defendant was either initially arrested, arraigned, or served with the original charge, and a showing of due diligence in securing defendant for the original charges is made by the prosecution; or

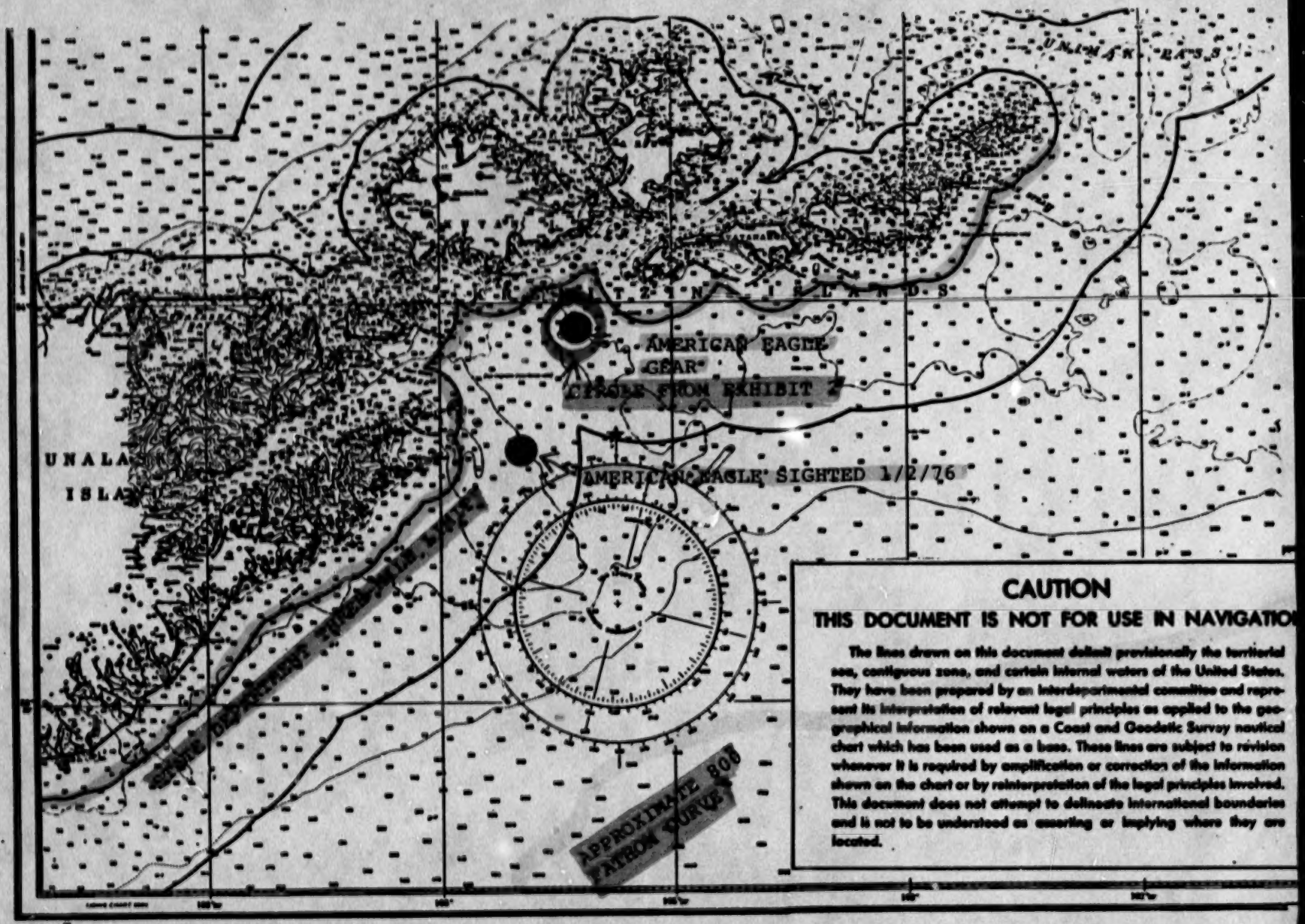
(2) If the defendant is to be tried again following a mistrial, an order for a new trial, or an appeal or collateral attack, from the date of mistrial, order granting a new trial, or remand.

(d) Excluded Periods. The following periods shall be excluded in computing the time for trial:

(1) The period of delay resulting from other proceedings concerning the defendant, including but not limited to

motions to dismiss or suppress, examinations and hearings on competency, the period during which the defendant is incompetent to stand trial, inaterlocutory appeals, and trial of other charges.

APPENDIX J



APPROXIMATE 800 FATHOM CURVE

APPENDIX K

Current (Post Uri) Regulations
(with emphasis added)

5 AAC 34.005

(b) Each statistical area consists of

(1) a registration area, comprised of all the waters within the statistical area which are territorial waters of Alaska; and

(2) an adjacent seaward biological influence zone, comprised of all the waters within the statistical area which are not part of the registration area.

(c) Registration areas are areas in which the department shall apply conservation and management regulations in order to protect and maintain the king crab resources of the state.

(d) Adjacent seaward biological influence zones are areas which the department shall utilize to obtain biological and fishing effort data and other information necessary for the formulation of comprehensive and

effective conservation and management regulations governing king crab resources inhabiting the registration area. However, regulations governing the registration area will also be applied in the adjacent seaward biological influence zone consistent with sec. 10 of this chapter.

5 AAC 34.010. APPLICATION OF REGULATIONS.

(a) Notwithstanding any other provision of this chapter, all regulations in this chapter applicable to a registration area shall be applicable also in its adjacent seaward biological influence zone.

Post Hjelle Regulations in Effect January 1976
(with emphasis added)

5 AAC 34.005

(b) Each statistical area consists of:

(1) a registration area comprised of all the waters within the statistical area which are waters subject to the jurisdiction of the state; and

(2) an adjacent seaward biological influence zone, comprised of all the waters within the statistical area which are not part of the registration area.

(c) Registration areas are areas in which the department shall apply conservation and management regulations in order to protect and maintain the king crab resources of the state.

(d) Adjacent seaward biological influence zones are areas which the department shall utilize to obtain biological and fishing effort data and other information necessary for the formulation of comprehensive and effective conservation and management regulations governing king crab resources inhabiting waters subject to the jurisdiction of the state.

5 AAC 34.010 - [No such regulation in 1976.]

(b) Persons on a vessel navigating within an adjacent seaward biological influence zone shall conduct their operations

and activities in full compliance with the regulations applicable to the appurtenant registration area.

(c) The commissioner may suspend the application of this section wholly or partially in any seaward biological influence zone if he finds that such application:

(1) does not tend to facilitate enforcement of regulations applicable to a registration area;

(2) does not tend to protect or conserve king crab inhabiting territorial waters of Alaska; or

(3) that the state has an insufficient interest in the king crab inhabiting the zone to warrant extension of the jurisdiction of the state to the zone.

5 AAC 34.035. CLOSURE OF REGISTRATION AREAS.

(a) The commissioner shall monitor the condition of king crab stocks in all

statistical areas through use of such data and information as are practically available.

(b) When the commissioner finds that continued fishing effort would jeopardize the viability of king crab within a registration area, he shall close the registration area by emergency order.

. . .

(f) The foregoing provisions of this section area applicable also to closures of district, subdistricts, sections, or any other portion of a statistical area.

5 AAC 34.035. CLOSURE OF REGISTRATION AREAS.

(a) The commissioner shall monitor the condition of king crab stocks in all statistical areas through use of such data and information as are practically available.

(b) When the commissioner finds that continued fishing effort would jeopardize

the viability of king crab within a registration area, he shall close the registration area by emergency order.

. . .

[No such subsection in 1976.]

5 ACC 34.091. UNLAWFUL ACTS WITHIN AN ADJACENT SEAWARD BIOLOGICAL INFLUENCE ZONE. It is unlawful for any person [to take king crab or do other acts] . . . in violation of sec. 010(b) of this chapter.

(1) from 12:00 noon, September 15 through February 15 or until closed by emergency order, king crab 6-1/2 inches (165 mm) or greater in width of shell may be taken or possessed;

(2) during periods to be opened and closed by emergency order, king crab 7-1/2 inches (191 mm) or greater in width of shell may be taken or possessed.

5 AAC 34.091. [No such regulation in 1976.]

5 AAC 34.610. FISHING SEASONS. King crab may be taken or possessed from 12:00 noon November 1 through February 15 unless the registration area is closed earlier by emergency order.

APPENDIX L

THE SUPREME COURT OF THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

STATE OF ALASKA	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
KONRAD S. URI,	)	No. 74-12,223 Cr.
PER NYMARK,	)	No. 74-12,231 Cr.
ARNOLD RASMUSSEN,	)	No. 74-12,217 Cr.
RONALD BEIRNES,	)	No. 74-12,222 Cr.
BORGE H. MANNES,	)	No. 74-12,219 Cr.
CARL PEROVICH,	)	No. 74-12,224 Cr.
BJORN NYMARK,	)	No. 74-12,221 Cr.
SVERRE A. YRI,	)	No. 74-12,230 Cr.
OLE HENDRICKS,	)	No. 74-12,233 Cr.
SIGMUND ANDREASSEN,	)	No. 74-12,232 Cr.
CORY A. KALDESTAD,	)	No. 74-12,274 Cr.
MICHAEL LYNCH, JR.	)	No. 74-12,218 Cr.
LARS MYHRE,	)	No. 74-12,234 Cr.
THOMAS HAUGAN	)	No. 74-12,220 Cr.
EMIL VINBERG	)	No. 74-12,247 Cr.
	)	
Defendants.	)	

MEMORANDUM AND ORDER

The defendants are commercial fishermen charged with having violated regulations of the State of Alaska purporting to govern the harvest of king crab in the Bering Sea. All of these offenses occured, if at all, in "the hole area" some 16 to 60 miles off the coast of Alaska.

The defendants move to dismiss the complaints, contending, in part, that the State of Alaska lacks jurisdiction to regulate the king crab fishery more than three (3) miles seaward of its shores.

At the outset, it is important to note that these cases do not involve the State's jurisdiction to enact and enforce so-called "landing laws". The charges in these cases specifically relate to conduct wholly occurring outside of Alaska's territorial waters.

Despite the disastrous consequences that may be in store for the king crab fishery and a substantial segment of Alaska's fishing community, I am forced to conclude that any attempt, by the State of Alaska, to regulate king crab fishing in the Bering Sea more than three miles from its shores, is in conflict with an area of exclusive federal jurisdiction and, there-

fore, prohibited by Article VI of the Constituion [sic] of the United States.

The Court hereby adopts and incorporates herein by reference, as the basis for its decision, the analysis and authorities cited in part II of defendants' Memorandum in Support of Motion to Dismiss, filed herein on October 2, 1974 (pp. 10-17.

Accordingly, defendants' motion to dismiss the complaints is granted upon the grounds stated. Having reached this conclusion, it is not necessary to decide the other issues raised by defendants' motion.

IT IS SO ORDERED.

DATED at Anchorage, Alaska, this 17th day of December, 1974.

EDMOND W. BURKE
Superior Court Judge

cc: Rozell
AG (Markham)

THE ATTEMPT BY THE STATE OF ALASKA TO REGULATE THE KING CRAB FISHERY IN THE BERING SEA CONFLICTS WITH AN AREA OF EXCLUSIVE FEDERAL JURISDICTION

While the State of Alaska was given certain proprietary rights within the three-mile belt as a result of the Submerged Lands Act passed in 1953, 43 U.S.C. 1301-15, Congress declared in the Outer Continental Shelf Lands Act, passed the same year, that seaward of the three-mile limit jurisdiction is federal rather than state.[5]

In Section 3 of the Outer Continental Shelf Act, it is stated:

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[5] The Outer Continental Shelf Lands Act was preceded in 1945 with a Presidential Proclamation which stated:

> Having concern for the urgency of conserving and prudently using its natural resources, the Government of the United States regards the natural resources of the subsoil and seabed on the Continental Shelf beneath the high seas but contiguous to the coast of the United States as appertaining to the United States, subject to its jurisdiction and control . . .

> (a) It is declared to be the policy of the United States that the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control and power of disposition as provided in this subchapter." 43 U.S.C. 1332(a).

Thus far, it is clear that the state jurisdiction conferred by the Submerged Lands Act terminates at three miles and there federal jurisdiction commences. The Act is also careful to point out in 43 U.S.C. 1332(b) that the

> character as high seas of the water above the Continental Shelf and the right to navigation and fishing therein shall not be affected.

However, with regard to the seabed, subsoil and resources of the Shelf itself, including king crab, the Act creates a federal enclave. It is stated in 43 U.S.C. 1333(a)(1):

> The Constitution and laws and civil and political jurisdiction of the United Staes are extended to the subsoil and seabed of the outer continental shelf and to all artificial islands and fixed structures

> which may be erected thereon for the purpose of exploring for, developing, removing, and transporting resources therefrom, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a state . . .

(Enphasis added)

Subsection (2) of this section provides that the federal officers and courts may enforce the civil and criminal laws of each adjacent state of the United States as of August 7, 1953 on the Continental Shelf. (It is to be noted that the date

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[6] The text of this section was modified during the debate in Congress:

> In the matter inserted in the conference report, the jurisdiction and control of the United States is extended to the seabed and subsoil of the outer Continental Shelf adjacent to the shores of the United States instead of merely to the natural resources of the subsoil and seabed as in the original House version and also the structures for their development such as artificial islands, drilling platforms, etc. Statement of House Manager, 1953 Congressional Record, House, 10419.

of "adoption" of state law precedes the adoption of the quota in this case by 20 years.) Section (3) of the statute goes on to state that:

> The provisions of this section for adoption of State Law as the law of the United States shall never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose over the seabed and subsoil of the outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom.

Thus, subsection (2) appears to be something in the nature of a federal assimilative crimes act for the federal enclave for the utilization of the state laws as of August 7, 1953. The regulations here, of course, could not be so assimilated because they did not exist (nor did the State of Alaska exist) as of August 7, 1953.[7]

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[7] An earlier version of the statute did not set a time, i.e. August 7, 1953, as the deadline for the assimilation of state law. It read: "The laws of each coastal State which so provide shall be applicable . . ." 1953 Congressional Record--House 4891. The statute, as passed, read:

Moreover, the statute clearly states that the state is to have no jurisdiction with respect to the "seabed, subsoil and natural resources of the Outer Continental Shelf. Such a statement of exclusive federal jurisdiction could be hardly more clear.

The Department of Justice felt strongly that the Outer Continental Shelf was an area of exclusive federal jurisdiction

7 (cont.)

> The civil and criminal laws of each adjacent state as of August 7, 1953 are declared to be the law of the United States, . . .

There was considerable debate on this point in the Senate on constitutional grounds. Sen. Cordon stated:

> Sec. 4 of the bill takes care of all of those provisions. The enactment as Federal law byreference of the laws so adopted are the laws as they exist at the time of enactment of S. 1901. Only already existing State laws will become the law of the U.S., and amendatory legislation by the States thereafter will not be applicable unless made so by later Federal legislation

1953 Congressional Record--Senate 6964.

in its report to Congress prior to passage of the bill. As Senator Cordon stated to the Senate:

> On the other hand, as pointed out in the report made by the Department of Justice on S. 1901, the area is one in which national and international problems intermingle. The Outer Continental Shelf is not and never has been within the boundary of any State or Territory, and it is, therefore, uniquely an area of exclusive Federal jurisdiction and control. The reports submitted on behalf of Attorney General Brownell stresses these two facts.
> The Department of Justice views are set forth in the committee report on S. 1901, Report No. 411, and it is also found in the hearings on S. 1901, along with oral testimony of Mr. J. Lee Rankin, Assistant Attorney General of the United States, which begins on page 625 of the hearings. The report of the Department states in part:
> This--that is, the outer Continental Shelf--is a Federal area, outside State boundaries, and to give the states a sort of extra territorial jurisdiction over it is unnecessary and undesirable. The situation is not comparable to that of federally owned areas within a State, as to which State law has some measure of applicability. Particularly in view of the intermingling of national and international rights in the area, it is

> important that the Federal Government which has the responsibility for handling foreign relations, have the exclusive control of law-making and law enforcement there.

1953 Congressional Record--Senate 6903. In fact, an attempt by way of an amendment to the bill to extend state boundaries to the seaward extremity of the Outer Continental Shelf was rejected by the Senate. 1953 Congressional Record--Senate 7232, 7236.[8] During the debate over the amendment, Senator Cordon succinctly stated:

> Again, that is the heart of the problem before the Senate--one we have discussed over and over again. Either the outer Continental Shelf is territory where the sole jurisdiction, control and right to tax in any form is in the United States or it is not.

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[8] The amendment was proposed by Senator Long. Another amendment proposed by Senator Ellender attempting to allow the states to extend their jurisdiction to the Continental Shelf had been previously rejected. 1953 Congressional Record--Senate 7228--7232.+

Later Senator Cordon again made clear that the Act was to provide for exclusive federal jurisdiction:

> Senator Cordon: The difference between that situation (the Mineral Leasing Act) and the one presented by the Outer Continental Shelf is that, with respect to the Mineral Leasing Act, the lands to which the Act is applicable are within the boundaries of the state and there is a degree of state jurisdiction. With respect to the Outer Shelf lands, they are wholly outside the boundary of any state, and there is no jurisdiction on the part of any state. To that extent there cannot be an application of state law under state jurisdiction. The distinction is an important one which the Senator from Oregon would like to have the record show.
>
> Mr. Daniel: I should like to ask one further question. Is it the opinion of the Senator from Oregon that if the Secretary deems it advisable in carrying on this cooperation with the state agencies and officials, facilities and employees as may be made available to him?
>
> Mr. Cordon: Under existing law, yes, but with special regard to the fact that there is no state jurisdiction on the Outer Continental Shelf.

1953 Congressional Record--Senate 10472.

Having established that the jurisdiction of

the federal government is exclusive with respect to the "natural resources" of the Outer Continental Shelf, the question becomes whether king crab are within those "natural resources". The answer that king crab are within the "natural resources" comes from not one but three sources.

First, the Submerged Land Act, of which the Outer Continental Shelf Lands Act is regarded as an amendment, specified:

> The terms "natural resources" includes, without limiting the generality thereof, oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs . . . and other marine animal and plant life but does not include water power or the use of water for production of power . . .

(43 U.S.C. 1301(e); Emphasis supplied)

Second, in the Convention on the Continental Shelf, which was ratified by the United States in 1960 and by the Union of Soviet Socialist Republics in 1961, it is stated that:

> The natural resources referred to in these articles consist of the mineral

> and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or subsoil.

Article 2, Section 4, 1958 Geneva Convention.

Thus, while it might be arguable that the Convention is much narrower than the Submerged Lands Act in defining a "natural resource", crab would meet the definition of the "sedentary species" in that the crab is in "constant physical contact" with the seabed.

Third, this was later made clear by the Secretary of Commerce when he defined as required by 16 U.S.C. 1081 and 1085 the sedentary species of the CContinental [sic] Shelf. This definition was published in Title 50, Code of Federal Regulations, Subchapter J--The Continental Shelf, which states in pertinent part:

Section 295.1 Purpose.

The purpose of the regulations in this part is to list those species determined by the Secretary of Commerce, in consultation with the Secretary of State, to constitute a Continental Shelf fishery resource, i.e., living organisms belonging to the sedentary species, which at the harvestable stage, either are immobile or under the seabed or are unable to move except in constant physical contact with the seabed or subsoil of the Continental Shelf.

Section 295.2 List of Species.

CRUSTACEA

Dungeness Crab--Cancer magister.
Tanner Crab--Chionoecetes tanneri.
Tanner Crab--Chionoecetes opilio.
Tanner Crab--Chionoecetes angulatus.
Tanner Crab--Chionoecetes bairdi.
King Crab--Paralithodes camtschatica.
King Crab--Paralithodes platypus.
King Crab--Paralithodes brevipes.
California King Crab--Paralithodes rathbund.
California King Crab--Paralithodes californiensis.
Stone Crab--Menippe mercenaria.
Lobster--Homarus Americanus.
Golden King Crab--Lithodes aequispinus.
Northern Stone Crab--Lithodes maia.
Stone Crab--Menippe mercenaria.
Deep-sea Red Crab--Ceryon quinquendens.

The regulations, constituting an attempt to invade an area under exclusive federal jurisdiction, must fail under the

supremacy caluse, [sic] Article VI, Clause 2 of the Constitution of the United States. Campbell v. Hussey, 368 U.S. 297 (1961); Hood v. Du Mond, 336 U.S. 525 (1948); Hines v. Davidowitz, 312 U.S. 52, 85 L. Ed 581 (1941); Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947).

In the Campbell case, state tobacco regulations were struck down even though not inconsistent with federal standards because the federal standards were the "official standards of the United States" and state regulations could not be permitted even as supplemental to those federal standards. In Rice v. Santa Fe Elevator Corp., supra, the court struck down the state regulations in a field which the states have traditionally occupied (warehousing) where the United States Warehousing Act provided that the "power, jurisdiction and authority" of the Secretary of Commerce "shall be exclusive with respect

to all persons."[9] In Missouri Pacific Railroad Co. v. Porter, 273 U.S. 341 (1927), a state statute concerning shipment on bills of lading was struck down as it would not be allowed to be

> . . . in coincidence with as complimentary to or as in opposition to the intention of Congress to enter a field that is within its jurisdiction.

Accordingly, the State of Alaska has no jurisdiction on the Outer Continental Shelf pursuant to the Supremacy Clause, Article VI, Clause 2, of the Constitution of the United States.

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[9] While warehousing licensing with a state might be a matter for traditional local concern and legislation there seems to be no history of regulation outside a state's territories; except of course with respect to State residents. Cf. Skiriotes v. Florida, 313 U.S. 69 (1941).

APPENDIX M

THE SUPREME COURT OF THE STATE OF ALASKA

STATE OF ALASKA Petitioner, v. WILDER S. RICE and CESSNA FINANCE CORPORATION, Respondents.	File No. 4777 OPINION

CESSNA FINANCE CORPORATION Cross-Petitioner, v. STATE OF ALASKA, WILDER S. RICE, and UNITED BANK OF ALASKA, Cross-Respondents.	File No. 4778 [No. 2321-April 10, 1981]

In File No. 4777, Petition for Review from the Superior Court of the State of Alaska, Fourth Judicial District, Fairbanks, Jay Hodges, Judge, on Appeal from the District Court of the State of Alaska, Christopher Cooke, sitting as District Court Judge.

In File No. 4778, Petition for Review from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, S. J. Buckalew, Jr., Judge.

Appearances: Sarah Elizabeth Fussner, Assistant Attorney General, Anchorage, and Avrum M. Gross, Attorney General, Juneau, for Petitioner/Cross-Respondent State of Alaska. Wilder S. Rice, Anchorage, pro se. James R. Peterson, Burr, Pease & Kurtz, Inc., Anchorage, for Respondent/Cross-Petitioner Cessna Finance Corporation.

Before: Rabinowitz, Chief Justice, Connor, Burke and Matthews, Justices, and Dimond, Senior Justice. [Boochever, Justice, not participating.]

RABINOWITZ, Chief Justice.
MATTHEWS, Justice, Concurring.

This petition for review considers important questions concerning mens rea in game regulations and issues of substantive and procedural due process as to security holders in the forfeiture of equipment for game violations.

Wilder Rice, a big game guide, and two clients of his were arrested and charged with killing a moose in violations of game regulations. More particularly, Rice and his co-defendants were charged with allegedly killing a moose the "same day airborne" in violation of 5 AAC 81.070

(b)(6).[1] Rice was also charged with transporting meat taken illegally in violation of 5 AAC 81.140(b)[2] Acquitted on the first charges, Rice was convicted of illegal transportation and sentenced in December 1977 to thirty days in jail, a $500 fine, and forfeiture of a Cessna airplane used in committing the alleged offense.

Rice appealed his conviction to the superior court on several grounds, including contentions that the regulation was

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[1] 5 AAC 81.070(b) provides, in part:

> (b) The illegal methods and means of taking big game . . . are
>
> . . . .
>
> (6) a person who has been airborne may not thereafter take or assist in taking big game until after 3:00 a.m. following the day in which the flying occurred . . . .

[2] 5 AAC 81.140(b) provides, "No person may possess or transport any game or parts of game illegally taken."

void for vagueness and that some form of intent must be implied in the regulation he was convicted of violating. Meanwhile, Cessna Finance, possessing a substantial security interest in the airplane, sought and was granted leave to intervene in the superior court proceedings, to plead violations of substantive and procedural due process in the forfeiture of the airplane without formal notice to it of the sentencing proceeding. The superior court overturned Rice's conviction and vacated the sentence, finding reversible error in the failure of the district court to instruct that the jury must find beyond a reasonable doubt that the defendant knew or should have known the moose meat was illegally taken.[3] The superior court

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[3] Specifically, the superior court stated:

> The court, however, feels that with respect to the question of the instruction as to knowledge under this

also held that constitutional due process requires "that in order to forfeit a third party's interest in this aircraft or in any other particular item, that notice and an opportunity to be heard must be given." The state then filed the instant petition for review.

(footnote 3 continued)

> particular regulation there should have been in instru -- by the plain reading of the regulation it would apply to anyone, however innocent or non-innocent they may be with respect to any knowledge they might have had or whatever steps they had gone through to ascertain whether or not the game in question was illegally [taken]. It could apply equally to Wien or any other person and therefore, because of that, the court is reversing the conviction. That this particular regulation, the way it is written, is not void for vagueness when the jury would be instructed that the particular individual involved who is charged with the crime either knew or should have known that the game in question was improperly taken.

Pursuant to AS 16.05.195[4], the state, on October 16, 1977, also filed a civil

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[4] AS 16.05.195 provides:

> Forfeiture of equipment. (a) Guns, traps, nets, fishing gear, vessels, aircraft, other motor vehicles, sleds, and other paraphernalia or gear used in or in aid of a violation of this title, or regulation promulgated under this title, and all fish and game or parts of fish and game or nests or eggs of birds taken, transported or possessed contrary to the provisions of this title, or regulation promulgated under it, may be forfeited to the state
>
> (1) upon conviction of the offender in a criminal proceeding of a violation of this title in a court of competent jurisdiction; or
>
> (2) upon judgment of a court of competent jurisdiction in a proceeding in rem that an item specified above was usded in or in aid of a violation of this title or a regulation promulgated under it.
>
> (b) Items specified in (a) of this section may be forfeited under this section regardless of whether they were seized before instituting the forfeiture action.
>
> (c) An action for forfeiture under this section may be joined with an alternative action for damages brought by the state to recover damages for the value of fish and game or parts of them or nests or eggs of bird taken, tansported or possessed contrary to

action in the superior court for damages against Rice and Reidt (one of the co-defendants) and for forfeiture of the airplane. On November 18, 1977, the state issued a notice of complaint for forfeiture which was sent to Cessna Finance. Cessna later moved for summary judgment on this action, asking, inter alia, that AS 16.05. 195 be held unconstitutional as violating

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(footnote 4 continued)

> the provisions of this title or a regulation promulgated under it.
> (d) It is no defense that the person who had the item specified in (a) of this section in possession at the time of its use and seizure has not been convicted or acquitted in a criminal proceeding resulting from or arising out of its use.
> (e) No forfeiture may be made of an item subsequently sold to an innocent purchaser in good faith. The burden of proof as to whether the purchaser purchased the item innocently and in good faith shall be on the purchaser.
> (f) An item forfeited under this section shall be disposed of at the discretion of the department.

due process. The superior court denied the motion, concluding that there was no denial of substantive due process in the forfeiture proceedings. Cessna petitioned for review of this ruling.

The petitions were granted[5] and the cases consolidated. The first issue that must be considered is whether the superior court erred in requiring an element of mens rea in the offense for which Rice was convicted.

Rice was convicted of violating 5 AAC 81.140(b), which provides: "No person may possess or transport any game or parts of game illegally taken." Rice contended on appeal and the superior court agreed that

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[5] Petitions were granted in the criminal case under former Alaska R. App. P. 23(c)(3) and in the civil case under former Alaska R. App. P. 23(d). We concluded that review should be granted pursuant to former Alaska R. App. P. 24(a)(1) since the issues were of such substance and importance as to warrant deviation from normal appellate procedures.

there is an implied element of intent in this offense, and that the accused must have known, or reasonably should have known, that the game was illegally taken. The state on appeal to this court argues that such an element should not be implied.

During argument on jury instructions before the district court, Rice's counsel brought up the issue of scienter and, after discussion, specifically requested an instruction that in order to convict, the jury "must be satisfied that the person either knew, or reasonably should have known, that the game or parts of game were illegally taken."[6] The district court denied the requested instruction, and Rice was convicted.

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[6] The state argues that the court must consider the question under the plain error standard since "the only instruction discussed in the points on appeal [to the superior court] and in the defendant's brief was a requested instruction that the jury must find beyond a reasonable doubt

This court has several times considered the question of whether a statute, which does not explicitly require criminal intent, implicitly requires it. The general position of the court was recently summarized in State v. Guest, 583 P.2d 836, 838 (Alaska 1978) (footnotes omitted):

> We recognized in in [sic] Spiedel v. State, 460 P.2d 77 (Alaska 1969), that consciousness of wrongdoing is an essential element of penal liability. 'It is said to be a universal rule that an injury can amount to a crime only when inflicted by intention -- that conduct cannot be criminal unless it is shown that one charged with criminal conduct had an awareness or consciousness of some wrongdoing.' Id. at 78. . . .
>
> Our opinion in Spiedel stated that there are exceptions to the general requirement of criminal intent which are categorized as 'public

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(footnote 6 continued)

that the defendant knew that the meat he transported was illegally taken." However, the actual transcript reveals that Rice requested an instruction in the form "know or reasonably should know." Therefore, the point was properly raised below, and the state's argument to the contrary is rejected.

> welfare' offenses. These exceptions are a rather narrow class of regulation, 'caused primarily by the industrial revolution, out of which grew the necessity of imposing more stringent duties on those connected with particular industries, trades, properties, or activities that affect public health, safety or welfare.' Spiedel v. State, supra, at 78. The penalties for the infraction of these strict liability offenses are usually relatively small and conviction of them carries no great opprobrium. Id. at 79.

The question is whether 5 AAC 81.140(b) is a public welfare regulation for which the omission of any requirement of criminal intent is valid. Kimoktoak v. State, 584 P.2d 25, 31 (Alaska 1978), we stated that such determinations are to be made on a case-by-case basis. It must be remembered that strict liability is an exception to the rule which requires criminal intent. Criminal statutes will be strictly construed to require some degree of mens rea absent a clear legislative intent to the contrary. Even when a statute, or a regulation, does not explicitly require any

element of mens rea, we will scrutinize the statute or regulation to determine whether mens rea must be made part of the definition of the particular offense.[7]

Strict liability offenses were originally considered in F. Sayre's classic article, Public Welfare Offenses,[8] in

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[7] In State v. Campbell, 536 P.2d 105 (Alaska 1975), we had implied that mens rea requirement would only be applied in crimes with common law origins. In Kimoktoak v. State, 584 P.2d 25, 31 (Alaska 1978), this court overruled Campbell and held that intent under certain circumstances would be read into non-common law offenses:

> Accordingly, we hold that to the extent that our decision in Campbell established the broad rule that criminal intent can be found by implication only in statutes which codify common law crimes, Campbell is overruled. Although we can conceive of cases where we may decline to imply such intent into statutes silent in this respect, hereafter we will resolve such questions on a case by case basis.

[8] F. Sayre, Public Welfare Offenses, 33 Colum. L. Rev. 55 (1933).

which he concluded that these offenses fell into certain limited categories.[9] Among these are "violations of general

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[9] Sayre grouped the categories as follows:

(1) Illegal sales of intoxicating liquor;
  (a) sales or prohibited beverage;
  (b) sales to minors;
  (c) sales to habitual drunkards;
  (d) sales to Indians or other prohibited persons;
  (e) sales by methods prohibited by law;
(2) Sales of impure or adulterated food or drugs;
  (a) sales of adulterated or impure milk;
  (b) sales of adulterated butter or oleomargarine;
(3) Sales of misbranded articles;
(4) Violations of anti-narcotic acts;
(5) Criminal nuisances;
  (a) annoyances or injuries to the public health, safety, repose or comfort;
  (b) obstructions of highway;
(6) Violations of traffic regulations;
(7) Violations of motor-vehicle laws;
(8) Violations of general police regulations, passed for the safety, health or wellbeing of the community.

Id. at 73 (footnote omitted).

police regulations."[10] These encompass, as originally proposed by Sayre, fish and game regulations,[11] and a number of fish and game regulations have been upheld on the theory of strict liability.[12] Thus, the mere fact that the case at bar involves a fish and game regulation might perhaps be considered by some to be sufficient to justify characterization of the subject offense as a strict liability offense.

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10 Id.

11 Id. at 87-88.

12 United States v. Ayo-Gonzales, 536 F.2d 652, 662 (5th Cir. 1976) (no intent required for statute prohibiting foreign vessels from fishing within contiguous fishing zone of United States); United States v. Ardoin, 431 F. Supp. 493, 495 (W.D. La. 1977) (offense of migratory bird hunting with aid of bait as a crime without intent); State v. Barber, 581 P.2d 27, 28-30 (N.M. 1978) (hunting by spotlight requires no criminal intent).

Nevertheless, we think that other concerns must also be considered. Fish and game regulations are not necessarily by their very nature immune from the requirement of mens rea. As we noted in Kimoktoak v. State, 584 P.2d 25, 31 (Alaska 1978), a danger of unconstitutionality is a relevant concern in determining whether to construe intent into the regulation:

> Finally, we note that in Campbell, we recognized the well-established rule of statutory construction that courts should if possible construe statutes so as to avoid the danger of unconstitutionality. We have alluded to this rule on many other occasions. It recognizes that the legislature, like the courts, is pledged to support the state and federal constitutions and that the courts, therefore, should presume that the legislature sought to act within constitutional limits. 2 Sutherland Statutory Construction, § 4509, at 326 (Horack 3d Ed. 1943). [footnote and citations omitted]

The wording of the regulation under consideration, 5 AAC 81.140(b), is broad. It provides: "No person may possess or

transport any game or parts of game illegally taken." Upon appeal to the superior court, Rice attacked the regulation as being void for vagueness. It is quite apparent from a reading of the transcript of the hearing before the superior court that the court was concerned with the broad applicability of the statute. It noted that, under the statute, if illegally taken game were found on board a commercial aircraft then the commercial airplane would also be subject to forfeiture. The seeming absurdity of the possible seizure of a commercial aircraft for shipping a piece of moose meat that would in no fashion reflect the fact that the moose was illegally killed no doubt had a persuasive impact on the superior court in reading an intent requirement into the regulation. By interpreting the regulation to embody a reasonable person standard in the phrase "knew or should have known," the superior

court concluded that the regulation was not void for vagueness.

A recent treatment of a claim of void for vagueness is found in this court's opinion in Holton v. State, 602 P.2d 1228 (Alaska 1979). In Holton, we set forth three factors that are applicable in considering such a claim:

> First, a statute may not be so imprecisely drawn and overbroad that it 'chills' the exercise of first amendment rights. The second consideration is that in order to be consistent with notions of fundamental fairness a statute must give adequate notice of the conduct that is prohibited. The final element in an analysis of statory vagueness is whether the statute's imprecise language encourages arbitrary enforcement by allowing prosecuting authority undue discretion to determine the scope of its prohibitions.[13]

The first is not applicable here, since the regulation does not concern First Amendment

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[13] Holton v. State, 602 P.2d 1228, 1235-36 (Alaska 1979), quoting Summers v. Anchorage, 589 P.2d 863, 866-67 (Alaska 1979) (footnotes omitted).

rights of speech, religion, association and expression.[14] The third consideration is also not applicable since recent cases have stated that this court "will not invalidate a statute on these grounds unless there is some history of arbitrary or selective enforcement"[15] and there was no showing of such a history in this case.

Thus, it is on the second of these factors, that of adequate notice, that a claim of void for vagueness must rest. In Stock v. State, 526 P.2d 3, 8 (Alaska 1974), we noted:

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[14] See e.g., Larson v. State, 564 P.2d 365, 372 (Alaska 1977) ("The criminal acts with which Larson was charged do not involve the exercise of these [First Amendment] rights, so this consideration is not pertinent.").

[15] Holton v. State, 602 P.2d 1228, 1237 (Alaska 1979); see Summers v. Anchorage, 589 P.2d 863, 868 (Alaska 1979).

The second consideration is that a statute must give adequate notice to the ordinary citizen of what is prohibited. This principle involves basic fairness and was long ago enunciated by the United States Supreme Court in Connally v. General Construction Co., stating:

> That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

A statute in its broad contours may be subject to criticism for failure to give adequate notice as to all types of conduct which are punishable, but, when not involved with the 'overbreadth' problem, may still pass muster if: (a) there can be no question as to its applicability to the particular offense involved, and (b) a construction may be placed upon the statute so that in the future the type of offenses coming within its purview may reasonably be understood. [footnotes omitted]

We find with the superior court that the statute is overbroad and that a proper limiting construction, implying a "know or reasonably should know" standard, is necessary to render the regulation constitutional.

In this case, we note that other state regulations concerning possession of illegally taken wildlife, specifically shrimp and crab, require criminal intent and take the form, "it is unlawful for any person to possess [shrimp or crab] . . . if that person knows or has reason to know that such shrimp was taken or possessed in contravention of the regulation of this chapter."[16] We conclude that identical

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[16] 5 AAC 31.090(c) provides:

(c) It is unlawful for any person to possess, purchase, barter, sell, or transport shrimp within the state or within waters subject to the jurisdiction of the state if that person knows or has reason to know that such shrimp were taken or possessed in contravention of the regulations of this chapter.

(footnote 16 continued)

5 AAC 32.090(c) provides:

> (c) It is unlawful for any person to possess, purchase, barter, sell, or transport dungeness crab within the state or within waters subject to the jurisdiction of the state if that person knows or has reason to know that such dungeness crab were taken or possessed in contravention of the regulations of this chapter.

5 AAC 34.090(c) provides:

> (c) It is unlawful for any person to possess, purchase, barter, sell, or transport king crab within the state or within waters subject to the jurisdiction of the state if that person knows or has reason to know that such king crab were taken or possessed in contravention of the regulations of this chapter.

These regulations were promulgated pursuant to AS 16.10.210 which provides:

> Unlawful sale or offer prohibited. It is unlawful for a person to possess, purchase, offer to purchase, sell, or offer to sell in the state migratory fish or migratory shellfish taken on the high seas knowing that they were taken in violation of a regulation promulgated by the Board of Fisheries governing the taking of migratory fish or migratory shellfish in certain areas designated by the Board of Fisheries or the commissioner.

language implying at least the element of negligence must be read into 5 AAC 81.140(b). Therefore, we affirm the superior court's setting aside of Rice's conviction because of the district court's failure to instruct the jury on this element of the alleged offense.

We note, additionally, that an alternative analysis compels the same result. Under the Alaska Constitution, "[s]ubstantive due process is denied when a legislative enactment has no reasonable relationship to a legitimate governmental purpose." Concerned Citizens of South Kenai Peninsula v. Kenai Peninsula Borough, 527 P.2d 447, 452 (Alaska 1974). See also Mobil Oil Corporation v. Local Boundary Commission, 518 P.2d 92, 101 (Alaska 1974). For the reasons discussed above, we believe that if enforced according to its literal terms, as imposing liability on any person who possesses or transports illegally taken

game without regard to whether such person knew or should have known of the illegality, 5 AAC 81.140(b) would bear no reasonable relationship to the legitimate regulatory purpose underlying it. We are therefore persuaded that the superior court's interpretation of 5 AAC 81.140(b) is required by substantive due process principles as well as by the void for vagueness rationale relied upon by this court.

Cessna has urged that both substantive and procedural due process have been or will be violated by forfeiture of Rice's airplane, in which Cessna has a security interest.[17] We first consider whether substantive due process is violated by the act of forfeiture itself, since such a

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[17] Cessna's security interest was $36,953.16 plus a substantial amount of interest.

finding would require return of the plane and would render the question of procedural due process moot.

The question before the court specifically is whether the superior court erred in failing to grant summary judgment for defendant Cessna Finance in the civil forfeiture action initiated by the state. Given its security interest in the airplane and its innocence in respect to the criminal offense upon which the forfeiture is based, Cessna contends that the civil forfeiture statute, AS 16.05.195,[18] deprives it of a property right without just compensation. Cessna does not contend that forfeiture is unconstitutional in respect to Rice, the titleholder of the airplane, but only as to itself as innocent holder of a security interest in the plane.

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[18] See note 4 supra.

The subject of forfeitures and their application to innocent parties' property was recently considered at length by the Supreme Court in Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 40 L. Ed. 2d 452 (1974). In Pearson Yacht, a yacht owned by Pearson had been leased to two persons, one of whom used it for transportation of marijuana, and thus it was subject to seizure under a Puerto Rican forfeiture statute. The Supreme Court, in determining that there was no constitutional violation in such seizure, offered a succinct discussion of the applicable law in this area. 40 L. Ed. 2d at 466-67.

As that Court observed, the history of forfeiture is deeply rooted in the common law with even Biblical origins.[19] It has

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[19] Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 681, 40 L. Ed. 2d 452, 466-67 (1974). For a comprehensive discussion of the history of forfeiture, see J. Finkelstein, The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures,

received widespread use and approval throughout the history of American jurisprudence.[20] "Despite this proliferation of forfeiture enactments, the innocence of the owner of property subject to forfeiture has almost uniformly been rejected as a defense."[21]

(footnote 19 continued)

Wrongful Death and the Western Notion of Sovereignty, 46 Temple L. Q. 169 (1973).

[20] [A]lmost immediately after the adoption of the Constitution, ships and cargoes involved in customs offenses were made subject to forfeiture under federal law, as were vessels used to deliver slaves to foreign countries, and somewhat later those used to deliver slaves to this country. The enactment of forfeiture statutes has not abated; contemporary federal and state forfeiture statutes reach virtually any type of property that might be used in the conduct of a criminal enterprise.

416 U.S. at 683, 40 L. Ed. 2d at 468 (footnote omitted).

[21] Id. See also United States v. One 1967 Cadillac Eldorado, 415 F.2d 647, 648-49 (9th Cir. 1969), and cases cited therein; United States v. One 1950 Burger Yacht, 395 F. Supp. 802, 803 (S.D. Fla. 1975).

The first suggestion for qualification came in the Supreme Court's opinion in United States v. United States Coin & Currency, 401 U.S. 715, 28 L. Ed. 2d 434 (1971), which seemed to indicate that lack of significant involvement in the criminal enterprise was a defense. Subsequently, in Pearson Yacht, the Supreme Court stated that such a conclusion was wrong. "Coin and Currency did not overrule prior decisions that sustained application to innocents of forfeiture statutes, like the Puerto Rican statutes, not limited in application to persons 'significantly involved in a criminal enterprise'"[22] The Court noted two instances in which constitutional questions might still arise. The first, if the property had been seized

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[22] 416 U.S. at 688, 40 L. Ed. 2d at 471.

when it was used without the owner's consent,[23] is not applicable in this case. The second instance alluded to by the Supreme Court involves "an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property."[24] Cessna argues that

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[23] [I]t would be difficult to reject the constitutional claim of an owner whose property subjected to forfeiture had been taken from him without his privity or consent.

416 U.S. at 689, 40 L. Ed. 2d at 471.

[24] Id. [footnote omitted).

In F/V American Eagle v. State, 620 P.2d 657, 666-68 (Alaska 1980), we considered a claim by owners of a seized fishing vessel that they were entitled to remission as innocent third parties. On the facts, we determined that all the owners were active business partners in the fishing vessel's activity and failed to demonstrate that they had done all that reasonably could be expected to prevent the proscribed use of the property.

this latter circumstance is parallel to its position in the case at bar. In such circumstances, the Supreme Court noted that "it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive."[25]

The primary purpose for forfeiture as noted by the Supreme Court in Pearson Yacht is as follows:

> Forfeiture of conveyances that have been used -- and may be used again -- in violation of the narcotics laws fosters the purposes served by the underlying criminal statutes, both by preventing further illicit use of the conveyance and by imposing an economic penalty, thereby rendering illegal behavior unprofitable. To the extent that such forfeiture provisions are applied to lessors, bailors, or secured creditors who are innocent of any wrongdoing, confiscation may have the desirable effect of inducing them to exercise greater care in transferring possession of their property.[26]

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[25] 416 U.S. at 689-90, 40 L. Ed. 2d at 472.

[26] See note 38 infra and accompanying text.

This passage clearly suggests that under federal constitutional due process, forfeiture of the interest of an innocent security holder, rather than that of an owner, is not violative of substantive due process, and does not come under the exception noted above. Several federal courts[27] and state courts[28] have so held.

Cessna asks, however, that we review its claim under the substantive due process clause of the Alaska Constitution. As we

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27 See United States v. One 1969 Plymouth Fury Auto, 476 F.2d 960, 961 (5th Cir. 1973), reh. denied, 509 F.2d 1324, cert. denied sub nom. Ford Motor Credit Co. v. United States, 423 U.S. 838, 46 L. Ed. 2d 57 (1975); United States v. One 1967 Ford Mustang, 457 F.2d 931 (9th Cir.), cert. denied sub nom. Bank of America Nat'l Trust & Savings Ass'n v. United States, 409 U.S. 850, 34 L. Ed. 2d 92, reh. denied, 409 U.S. 1050, 34 L. Ed. 2d 503 (1972).

28 See e.g., Commonwealth v. One 1977 Pontiac Grand Prix Auto, 378 N.E. 2d 69, 72 (Mass. 1978); Dillon v. Barefoot, 389 N.Y.S. 2d 513 (N.Y. Sup. 1976).

have previously noted, although this court is bound to enforce constitutional protections under the Federal Constitution, we also have a concomitant duty to develop constitutional rights under the Alaska Constitution:

> if we find such fundamental rights and privileges to be within the intention and spirit of our local constitutional language and to be necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage. We need not stand by . . . waiting for constitutional direction from the highest court of the land. Instead, we should be moving concurrently to develop and expound the principles embedded in our constitutional law.

Baker v. City of Fairbanks, 471 P.2d 386, 402 (Alaska 1970) (footnotes omitted).

Cessna's claim under both the Federal and State Constitutions is largely based on the lack, under the Alaska statutory scheme, of a remissions procedure. Alaska's forfeiture statute only allows for

remission when an innocent buyer subsequently purchases, in good faith, property subject to forfeiture.[29] It makes no provision for remission to an innocent owner or security holder.[30] On the

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[29] AS 16.05.195(e) provides:

> No forfeiture may be made of an item subsequently sold to an innocent purchaser in good faith. The burden of proof as to whether the purchaser purchased the item innocently and in good faith shall be on the purchaser.

[30] A bill was before the Alaska legislature in the 1979 session to provide for remission and adopt procedures for remission in this situation. Committee Substitute for S.B. 7, 11th Leg., 1st Sess. (1979). The bill provided for a new statute which would have read, in part:

> (d) If an item specified in AS 16.05.190(a) is forfeited, a claimant who holds an interest in the item and has filed a timely claim, may petition the court in which the action is pending for remittance of his interest upon showing at a hearing before the court as trier of fact that
>
> (1) he holds a valid interest in the item and
>
> (2) he was not a consenting party to nor privy to the illegal act.

other hand, the state notes that remission for forfeitures and fines is available by application to the governor under his power of executive clemency:

> Subject to procedure prescribed by law, the governor may grant pardons, commutations, and reprieves, and may suspend and remit fines and forfeitures.

Alaska Const. art. III, § 21. Cessna argues that this is not a substitute for an administrative remission procedure and that no procedures have been established for remission under executive clemency.

Cessna also points to the text of a footnote in Pearson Yacht in which the Supreme Court notes the long history of federal provisions for remission of forfeited property to innocent owners:

> Since 1790 the Federal Government has applied the ameliorative policy -- first adopted in England -- of providing administrative remissions and mitigations of statutory forfeitures in most cases where the violations are incurred 'without willful negligence' or an intent to commit the offense. Indeed, forfeitures incurred

> under 21 USC § 881(a), which served as the model for enactment of the disputed Puerto Rican statute, are subject to the remission and mitigation procedures of 19 USC § 1618. Regulations implementing § 1618 provide that, if the seized property was in the possession of another who was responsible for the act which resulted in the seizure, the petitioner must produce evidence explaining the manner in which the other person acquired possession and showing that, prior to parting with the property, he did not know or have reasonable cause to believe that the property would be used in violation of the law or that the violator had a criminal record or a reputation for commercial crime. 19 CFR § 171.13(a). These provisions are also extended to those individuals holding chattel mortgages or conditional sales contracts. 19 CFR § 171.13(b). See also 18 USC §3617(b) establishing standards for judicial remission and mitigation of forfeitures resulting from violations of the internal revenue laws relating to liquor.[31]

The importance of a remission procedure has also been noted in several other cases.[32]

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[31] Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 689 n.27, 40 L. Ed. 2d 452, 471 n.27 (1974) (citations omitted).

[32] United States v. United States Coin & Currency, 401 U.S. 715, 721, 28 L. Ed. 2d 434, 439 (1971); United States v. One 1976

The state argues that none of these cases hold that remission is constitutionally required. However, after careful consideration, we are persuaded that a remission procedure is mandated under the Alaska Constitution. Not to allow innocent owners and security holders to show that they have not been involved in the criminal activity that triggered the forfeiture proceeding violates Alaska's constitutional due process provision.

The law of forfeiture, as already noted, is of ancient origin dating back to Biblical times. The theory of civil forfeiture is that the action is in rem, against the object. As the Supreme Court noted in United States Coin & Currency:

(footnote 32 continued)

Lincoln Mark IV, 462 F. Supp. 1383 (W.D. Pa. 1979); United States v. One 1974 Mercury Cougar, 397 F. Supp. 1325 (C.D. Cal. 1975).

> [F]orfeiture actions have proceeded upon the fiction that inanimate objects themselves can be guilty of wrongdoing. . . . The forfeiture action in the present case was instituted as an in rem proceeding in which the money itself is the formal respondent. More remarkable, the Government's complaint charges the money with the commission of an actionable wrong. [footnotes omitted] [emphasis in original]

401 U.S. at 719-20, 28 L. Ed. 2d at 438. Although the implicit fiction in forfeiture actions is often acknowledged by courts, lingering concepts derived from that fiction have kept forfeitures from receiving clear analysis. As one commentator noted:

> An automobile that had been used to violate the revenue laws, or the narcotics laws is not a 'dangerous res. . . . It is neither more nor less dangerous to the public welfare or safety than any other automobile. The simple proof of the distinction, of course, is that such confiscated automobiles are not in fact destroyed, but are ultimately sold, their proceeds going to the public treasury, while the cars themselves, having publicly 'expiated' for being 'offending reae,' may resume their normal 'life' on the public highways. The ox that gored a person to death was

> treated as a real felon -- as were all those domestic animals that were tried before regular courts in the Middle Ages for causing the death of a person -- and was duly executed. The procedure was the natural consequence of a bona fide concern about a human life and not a subterfuge by means of which the authorities were aiming to penalize the owner of the beast. The modern doctrine of the offending res, on the other hand, is a deliberate subterfuge -- a judicial fiction, by resort to which the sovereign, with the sanction of the courts, can impose a punishment on a blameless individual who is thereby deliberately left without recourse to his constitutional rights of due process.[33]

What purpose is left then to forfeiture if it is not to destroy and expiate the offending res? One purpose is to prevent possible use of the property in further illicit acts.[34] This purpose is well served when the seized property is not

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[33] See J. Finkelstein, supra note 19 at 252.

[34] Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 687, 40 L. Ed. 2d 454, 470 (1974); F/V American Eagle v. State, 620 P.2d 657, 668 (Alaska 1980).

returned to the offender. It is not served when the interests of innocent non-negligent third parties are left unprotected or uncompensated. All that remain as purposes for forfeiture are the goals generally advanced for penal measures.[35]

If this is accurate, then what purpose is served by punishing the owner who has done all that reasonably could be expected to prevent illegal use? Or in punishing a security holder who has an interest in the forfeited item and has done everything possible to prevent its illegal use, especially considering the minimal control that a security holder has over an item whose ownership is in the hands and direct control of another? The Supreme Court, in Pearson Yacht, stated that as to secured creditors, "confiscation may have the

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[35] See State v. Chaney, 477 P.2d 441, 444 (Alaska 1970).

desirable effect of inducing them to exercise greater care in transferring possession of their property."[36] We think that limits must be recognized as to the care a creditor can be required to take to safeguard a security interest. We think that if a party can show "the manner in which the property came into possession of such other person" and that "prior to parting with the property he did not know, nor have reasonable cause to believe,

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[36] Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 686-88, 40 L. Ed. 2d 452, 470-71 (1974). The Court also noted:

> Seizure and forfeiture statutes also help compensate the Government for obtaining security for subsequently imposed penalties and fines. [citations omitted]

416 U.S. at 687 n.26, 40 L. Ed. 2d at 470 n.26. We do not find these interests compelling when the seizure involves property of innocent owners and security holders.

[either] that the property would be used to violate [the law, or] . . . that the violator had a criminal record or a reputation for commercial,"[37] substantive due process under the Alaska Constitution requires that a procedure be available for remission of the forfeited item.

Here, Cessna Finance has asserted it is an innocent holder of an interest in the seized airplane which did all it could reasonably be expected to do. We conclude that Cessna has been deprived of its constitutional rights to substantive due process through the failure of the statutory scheme relating to forfeitures to provide for remission of the interests of innocent non-negligent third parties in the forfeited item. Thus, the case is remanded to the superior court to hold a remission

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[37] 19 CFR § 171.13(a).

hearing. If Cessna Finance can make the requisite showing,[38] it is entitled to reimbursement from the state for its share in the forfeited airplane at the time of seizure.

Having determined that the forfeiture itself violated substantive due process, we need not consider whether the superior court was correct in finding that procedural due process was also violated.

AFFIRMED in part; REVERSED in part.

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[38] The state argues that Cessna had not done anything more than a routine credit check. However, it seems that Rice had neither a prior criminal record nor a record or reputation as a game law violator. If the inquiry would have revealed nothing, the loan was made in good faith. If Cessna had no knowledge that Rice was a violator of the game laws and was not negligent in its inquiry, it is entitled to remission. Cf. United States v. One 1972 Ford Pickup Truck, 374 F. Supp. 413, 415 (E.D. Tenn. 1973).

MATTHEWS, Justice, concurring.

I agree with the result of the majority opinion. However, the majority's reasons for imposing a mens rea requirement as a part of 5 AAC 81.140(b) seem to me to be somewhat unfocused.

The majority's first reason is that without a mens rea requirement the regulation is overbroad and is therefore void for vagueness. The concept of overbreadth as it is used in vagueness cases refers to a lack of fair notice as to what conduct is punishable. Stock v. State, 526 P.2d 3, 8 (Alaska 1974). Here there is fair notice in the sense that the regulation is linguistically precise in delineating the type of conduct proscribed. The problem with it is that it includes within its ambit the conduct of people who have no reason to believe that what they are doing is criminal. I suggest, therefore, that the

vagueness rationale does not support the conclusion reached.

The alternative reason set out by the majority strikes down the regulation because it has no reasonable relation to a legitimate governmental purpose. Once again, this is at best a tangential expression of what is wrong with the regulation. There certainly is a legitimate government interest in preventing the unlawful killing of game, and imposing strict forfeiture or criminal fines on persons who transport unlawfully killed game bears a relationship to the accomplishment of that purpose.

I would require mens rea as an element of this regulation because the penalty for its violation includes a possible six-month term of imprisonment. See AS 16.05.900(a). In my view due process requires that there be a culpable mental state in every case where a sentence of imprisonment may be

imposed. Although we have never unconditionally adopted such a rule, our cases suggest that it is appropriate.

In Speidel v. State, 460 P.2d 77 (Alaska 1969) we held that a culpable mental state must exist for there to be a conviction of a crime. We recognized a "public welfare offense" exception to this rule, and noted that such offenses are characterized by relatively small penalties, and conviction of them does not significantly damage one's reputation. Id. at 79.

In Alex v. State, 484 P.2d 677, 681 (Alaska 1971), we reaffirmed the principles of Speidel and noted "the necessity of basing serious crimes upon a general criminal intent as opposed to strict criminal liability which applies regardless of intention," the goal being to "avoid criminal liability for innocent or inadvertent conduct." Accord Kimoktoak v. State,

578 P.2d 594 (Alaska 1978); State v. Guest, 583 P.2d 836 (Alaska 1978).

Likewise, in the recent case of Hentzner v. State, 613 P.2d 821, 825 (Alaska 1980), we noted that the "'general conditions of penal liability' require 'not only the doing of some act by the person to be held liable, but also the existence of a guilty mind during the commission of the act.'"

These cases establish that mens rea is an essential element for criminal liability, except as to crimes for which the penalties are relatively small, and do minimal damage to the offender's reputation. In my view, any prison sentence is an important, even traumatic, event in the life of a human being, especially one who conducts his affairs with an intent to conform to the norms required by law. Further, any prison sentence is likely to have a considerable detrimental effect on

one's reputation. The laws of our society should not be structured so that an individual may be jailed for conduct which he reasonably believes to be lawful. Therefore, I believe that a mens rea requirement should be imposed in all cases in which the penalty may be incarceration.[1]

Many commentators agree with this position. For example, in F. Sayre's article, Public Welfare Offenses,[2] he notes that the severity of the penalty represents a cardinal principle upon which

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[1] The possibility of incarceration is a dividing line between serious and non-serious crimes for other purposes in the criminal law such as the right to trial by jury and to court appointed counsel. Alexander v. City of Anchorage, 490 P.2d 910, 915 (Alaska 1971); Baker v. City of Fairbanks, 471 P.2d 386, 401-02 (Alaska 1970).

[2] F. Sayre, Public Welfare Offenses, 33 Colum. L. Rev. 55 (1933).

to determine whether mens rea should be required. He concludes that if the possible penalty is serious, particularly if it involves imprisonment, the defendant's individual interest weighs too heavily to allow conviction without proof of mens rea:

> To subject defendants entirely free from moral blameworthiness to the possibility of prison sentences is revolting to the community sense of justice; and no law which violates this fundamental instinct can long endure. Crimes punishable by prison sentences, therefore, ordinarily require proof of a guilty intent.[3]

Accord W. LaFave & A. Scott, Handbook on Criminal Law § 31 at 218 (1972); Model Penal Code § 2.05, Comments (Tent. Draft No. 4, 1955).

For these reasons I agree that a mens rea element should be read into 5 AAC 81.140(b).

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[3] Id. at 72.

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No. 80-2056

In the Supreme Court

OF THE

United States

OCTOBER TERM 1981

THE F/V AMERICAN EAGLE, ADF&G No. 39, and $100,677.50 REPRESENTING THE PROCEEDS OF 143,825 lbs. of Alaska King Crab Delivered Pursuant To ADF&G Fish Ticket Nos. E95626 and E95627
Appellants,

VS.

STATE OF ALASKA,
Appellee.

On Appeal from the Supreme Court of the State of Alaska

MOTION TO DISMISS OR AFFIRM

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Presidential Proclamation No. 2668, September 28, 1945 U.S. Code Cong. Serv. at 200-01 (1945) 10 Fed. Reg. 12304 14

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No. 80-2056

In the Supreme Court

OF THE

United States

OCTOBER TERM 1981

THE F/V AMERICAN EAGLE, ADF&G No. 39, and
$100,677.50 REPRESENTING THE PROCEEDS OF 143,825 lbs.
of Alaska King Crab Delivered Pursuant To
ADF&G Fish Ticket Nos. E95626 and E95627
Appellants,

VS.

STATE OF ALASKA,
Appellee.

On Appeal from the
Supreme Court of the State of Alaska

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Rules of the Supreme Court, Appellee, the State of Alaska, respectfully moves that the appeal in this matter be dismissed on the grounds that it fails to present a substantial federal question meriting any further argument in this Court, or, in the alternative, that the decision of the Supreme Court for the State of Alaska be affirmed.

STATEMENT OF THE CASE

This case arises from an *in rem* forfeiture action brought by the State of Alaska against the F/V American Eagle, based on the vessel's commercial king crab fishing activities in the Egg Island District of Westward Shellfish Statistical Area O from January 2-7, 1976, almost two months after the district had been closed by emergency order of the Alaska Department of Fish and Game. This district is located in the Aleutian Islands and includes waters lying beyond the traditional three mile limit of state territorial seas.

On January 9 and 12, 1976, the vessel entered Kizhuyak Bay and Port Lions at Kodiak Island but departed without delivering crab. R. 354. The vessel eventually delivered its crab at Pelican, in Southeast Alaska, where proceeds from the sale in the amount of $100,677.50, and the vessel and gear were seized by State officials on January 16, 1976. On January 28 the State of Alaska filed a civil *in rem* forfeiture proceeding pursuant to AS16.05.190 and .195 seeking forfeiture of the vessel and its proceeds for the alleged fishing in closed waters. Discussions with the owner led to a negotiated release of the vessel and gear on February 10, 1976.

On December 1, 1977 the Alaska superior court entered findings of fact, after a five day trial in July 1977, that the F/V American Eagle was used in aid of violations of provisions of the Alaska Administrative Code by taking and possessing king crab within the Egg Island District during a closed season.

The superior court decision forfeited only the proceeds and a $350,000 bond posted in connection with the negotiated release. The State contended that the bond was not a stipulation for value that substituted for vessel forfeiture but, instead, was in the nature of a guarantee of delivery to Kodiak upon a judgment of forfeiture. The Alaska supreme court found that the stipulation was ambiguous, and substituted the bond for the vessel. The State does not further cross-appeal this determination.

Alaska has exercised management activity over king crab beyond three miles since the Bering Sea crab fishery developed in the late 1960's. In the absence of a Fishery Management Plan under the Fishery Conservation and Management Act, 16 U.S.C. 1801 *et seq.*, the State continues enforcing conservation regulations beyond three miles.

ARGUMENT

THE ISSUES RAISED BY APPELLANTS ARE NOT SUBSTANTIAL FEDERAL QUESTIONS REQUIRING REVIEW

In this appeal, the vessel owners raise several arguments challenging the Alaska supreme court decision. These include a challenge to the State's regulation beyond three miles as violative of the commerce clause and of due process, an assertion that the regulation of crab beyond three miles is exclusively federal under the supremacy clause and federal statutes, a claim that the State's fishing regulations are impermissibly vague, and a challenge to the State's forfeiture law as violative of due process protections. All of these issues were carefully considered by the Alaska supreme court. Its decision is plainly correct, is in harmony with this Court's decision on these subjects, and the arguments advanced by Appellants are too insubstantial to merit further review.

1. ALASKA'S KING CRAB FISHING REGULATIONS COMPLY WITH THE COMMERCE CLAUSE

Appellants argue that Alaska's assertion of jurisdiction over king crab in waters beyond the three mile limit of the territorial sea is a *per se* violation of due process and the commerce clause. Jurisdictional Statement of Appellants at p. 7. This assertion ignores the well established, flexible judicial analysis applicable to extraterritorial state regulation of fisheries resources, which involves three elements:

(1) a legitimate local purpose;

(2) an evenhanded, nondiscriminatory effect on interstate commerce; and

(3) not being excessive in relation to the local benefits.

Hughes v. Oklahoma, 441 U.S. 322, 331 (1978), citing *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142 (1970). The State's regulation of king crab fishing in waters in the Egg Island District satisfies each of these commerce clause tests, as outlined below.

A. Legitimate Local Purpose

The state's king crab regulations serve the definite local purpose of "conserving and developing the fishery resources of the state" (A.S. 16.05.221(a)), "for the maximum benefit of its people" in accordance with the "sustained yield principle." Constitution of the State of Alaska, Article VIII, Sections 2 and 4.

Appellants dispute the local purpose of Alaska's regulation of king crab beyond three miles because a 1974 case involving Bering Sea king crab suggested, at the preliminary injunction stage, that there was not enough evidence before the court to establish a basis for jurisdiction. Two members of the three judge panel thought that "the percentage of king crab taken commercially within Alaska waters is very small in comparison to that taken in the

rest of the Bering Sea Shellfish Area." *Hjelle v. Brooks*, 377 F. Supp. 430, 441 (D. Alaska 1974). Appellants apparently believe that this interlocutory ruling applies to invalidate Alaska's exercise of fisheries jurisdiction in the Egg Island District south of the Aleutian chain. However, that view ignores the reasoning of the third judge's opinion in *Hjelle*,[1] fails to acknowledge a subsequent factual review of the many contacts between the State and the crab fishermen who fish beyond the territorial seas, as well as the highly migratory nature of the Alaska king crab, and the differences between the *Hjelle* facts and those of the instant appeal. *See State v. Bundrant*, 546 P.2d 530 (Alaska 1976), appeal dismissed *sub nom. Uri v. Alaska*, 429 U.S. 806 (1976).

Reliance on *Hjelle* is further misplaced because the same fishermen who had earlier been successful in *Hjelle* were subsequently unable to obtain a temporary restraining order against revised extraterritorial regulations adopted by the State in 1974. *Bundrant*, 546 P.2d at 534.

In *Bundrant*, the Alaska supreme court reviewed the Bering Sea king crab fishery and confirmed the following personal and resource contacts:

1. king crab have a substantial economic impact on Alaska (pp. 552, 557);
2. king crab depend on the territorial sea for nursery areas (p. 522);
3. extraterritorial fishing has a major effect on the stocks growing and developing in the territorial sea (p. 552);

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[1]The minority judge in *Hjelle* identified many contacts in that case: he pointed out the existence of the following substantial state consequences that already characterized the extraterritorial crab fishery:

1. effect on crab within territorial waters;
2. effect on local fishermen;
3. effect on shore processors. *Id.* at 445.

4. king crab migrate across, and exist both within and without the three mile limit (pp. 553-554);

5. significant fishable populations of king crab are found in the territorial waters (p. 533);

6. it is necessary to regulate crab when they travel beyond three miles to assure their maximum sustained yield within three miles (p. 554);

7. subsistence uses exist in the territorial sea (p. 554; *see also* 5AAC 02.500, .520);

8. contacts with Alaska by fishermen from other states include:

a. Alaska fishing licenses and vessel registrations,

b. activities in territorial sea area, and

c. use of Alaska facilities (p. 556)[2]; and

9. king crab play an important role in maintenance of other species of marine resources in the territorial sea (p. 557).

Fishing in the Egg Island District is characterized by an even closer association with the State's territorial sea because this area lacks the extensive shallow shelf involved in *Hjelle*, which extends more than 100 miles from shore, and which affords feeding grounds for the crab during their annual offshore migration. Appendix A. The narrower shelf in the Egg Island District favors fishing activities more closely associated with the territorial seas, rather than the more widely distributed fishing efforts involved in *Hjelle*.

Other nexi with the State result from the nature of crab fishing activities. In the fall of 1975 an intense, one week Egg Island District fishery was closed by Emergency

[2]Fishermen have Alaska commercial fishing licenses and vessel registrations. Jurisdictional Statement of Appellants at A-87, ¶ 4-5; AS 16.05.475, AS 16.05.480, AS 16.05.490, AS 16.05.510, AS 16.05.520, AS 16.05.530, AS 16.43.140, 5 AAC 39.120; they comply with reporting requirements and fish ticket forms (5 AAC 39.130(c)) and satisfy other essential contacts with the State.

Order No. 20 on November 7, 1975. Appendix B. The participants in that fishery could then move to other local areas and continue their fishing activities. Appendices C-E. Those movements involved further significant State contacts because at periodic intervals as short as 12 hours, the fishermen lifted crab pots to make deliveries of captured crab to Alaska ports. TR.579. These all represent significant local interests.

B. Nondiscriminatory Effect

Regulations governing fishing areas, times, gear types, sex and size of crab, harvest levels, reporting requirements, etc. (5 AAC 34.005-650), apply evenhandedly to all fishermen, resident and non-resident alike. Similarly, the crab, once harvested, freely enter the stream of interstate or foreign commerce without unequal or discriminatory treatment of any user group. Appellants can cite no evidence to the contrary.

C. Reasonable Impact

The great importance of the king crab fishery to the State's economy shows that the State's nondiscriminatory commercial fishing regulations are not excessive when compared to the need to conserve the king crab resource and protect it from unregulated, indiscriminate fishing. The significance of the fishing industry in Alaska has already been well established. See e.g. *Metlakatla Indian Community v. Egan*, 369 U.S. 45, 46 (1961); *Glenovich v. Noerenberg*, 346 F. Supp. 1286, 1288 (D. Alaska 1972); *Anderson v. Mullaney*, 191 F. Supp. 123, 127 (9th Cir. 1951) aff'd *Mullaney v. Anderson*, 342 U.S. 415 (1952); *Bundrant*, 546 P.2d at 541, citing *Hjelle*, 377 F. Supp. at 433, *Isakson v. Rickey*, 550 P.2d 359, 360 (Alaska 1976). Judicial recognition of the local importance of fisheries in these cases is consistent with this Court's classification of fishing as a "local activity". *Alaska v. Arctic Maid*, 366 U.S. 199, 204 (1961); *California v. Zook*, 336 U.S. 725 (1949).

Where, as here, all commerce clause tests are satisfied, the state's special interest in preserving its wildlife prevails unless a regulation directly conflicts with a federal statute. *Hughes v. Oklahoma*, 441 U.S. at 342 (dissent), citing *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 284, 285 (1977), *Kleppe v. New Mexico*, 426 U.S. 529, 546 (1976), and *Toomer v. Witsell*, 334 U.S. 385, 402 (1948); *see also: Baldwin v. Montana Fish and Game Commission*, 436 U.S. 371, 385-386 (1978), *Defenders of Wildlife v. Andrus*, 627 F.2d 1238 (D.C. Cir. 1980). As pointed out in Section 2 below, no conflict with federal fishing plans exists in this case.

In summary, the State of Alaska can regulate the conduct of king crab fishermen beyond three miles in the Egg Island District because of the substantial nexi of the resource and the fishermen to the territorial sea and land areas.

D. Alaska May Apply Its Regulations to Non-Residents

Appellants conclude their first (commerce clause) argument with the contention that the Washington citizenship of the vessel owners excludes them from any obligation to comply with Alaskan commercial fishing laws. They rely on *Skiriotes v. Florida*, 313 U.S. 69 (1941), *People v. Weeren*, 163 Cal. Rptr. 255, 607 P.2d 1279 (Calif. 1980), *cert. denied* ..... U.S. ....., 66 L.Ed. 2d 45 (1980), and *Northwest Trollers Ass'n v. Moos*, 1568 P.2d 793 (Wash. 1977), for the proposition that a state can only regulate its *citizens* beyond three miles. This argument merits little attention. Though *Skiriotes* and its post-Fishery Conservation and Management Act[3] companions *Moos* and *Weeren* do involve violations by resident fishermen, neither has

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[3]The Fisheries Conservation and Management Act extended federal jurisdiction to 200 miles effective March 1, 1977. 16 U.S.C. 1801 *et seq.*

been so restrictively applied. For example, in *United States v. Sylvester*, 605 F.2d 474, 475-476 (9th Cir. 1979) the appeals court did not attach significance to citizenship when it approved extraterritorial enforcement of Alaska's hunting laws under the Lacy Act (16 U.S.C. § 667e, 668d, 701; 18 U.S.C. §§ 42-44, dealing with interstate shipment of animal parts taken in violation of state law.). The court agreed with the district judge that:

> "[A] State may reach beyond its borders under its police power, to regulate game and fish if those regulations have a sufficient nexus with the protection and preservation of wildlife within the State. *Silz v. Hesterberg*, 211 U.S. 31, 29 S.Ct. 10, 53 L.Ed. 75 (1908); *Bayside Fish Flour Co. v. Gentry*, 297 U.S. 422, 56 S.Ct. 513, 80 L.Ed. 772 (1936)." In addition, there must be "a sufficient relationship between the regulating State and the person whose conduct is regulated. *Skiriotes v. Florida*, 313 U.S. 69, [61 S.Ct. 924, 85 L.Ed. 1193.] (1941)."

In addition, *United States v. Thompson*, an unpublished opinion of the United States District Court for the District of Alaska, No. A-87-72 Civ., dated December 15, 1972 cited in *Bundrant*, 546 P.2d at 556, similarly transcended citizenship and applied polar bear regulations to non-residents as well as residents under the Lacy Act.

Appellants rely heavily upon *Moos* for their citizenship argument. However, that decision is not valid authority for restricting the application of extraterritorial fishing regulations to citizens. In *Moos*, Washington's extraterritorial fishing regulations were held invalid because Washington State had violated its own statute, RCW 75.40.050, by adopting "regulations governing the offshore fishery which are inconsistent with those of the states of Oregon and California." *Id.* at 795. The appellate court's gratuitous dicta regarding the trial court's comment that extraterri-

torial regulations cannot apply to non-residents was not a basis for the higher court's opinion.

In addition, *Moos* and *Weeren* were decided under the recent Fishery Conservation and Management Act which established another, simpler basis for jurisdiction. 16 U.S.C. § 1856 (a) allows extraterritorial application of state fisheries laws over "vessels registered under the laws of such State." Hereafter, a case by case evaluation of "citizenship" of owners or crew is unnecessary if the vessel jurisdictional test is satisfied.[4]

It is undisputed that the F/V American Eagle, the vessel against which this proceeding was brought, was registered under the laws of Alaska.[5] Further, the vessel's crew had other substantial contacts with Alaska in conducting their fishing operations. In addition, the crab that were the target of their operations were inextricably associated with waters both within and without the territorial sea of Alaska.

Appellants do not raise a substantial challenge to the State's management regime. Extraterritorial application of regulations for the Egg Island District was consistent with the commerce clause and all fisheries conservation laws in force in January 1976. It would also have been appropriate under the Fishery Conservation and Management Act. Moreover, the regulation of king crab beyond territorial seas is clearly not an area of exclusive federal law, as outlined below.

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[4]Appendix F evidences federal understanding of court decisions allowing extraterritorial state jurisdiction before and after the Fishery Conservation and Management Act. See especially pp. 1, 4 at ¶ (b), and 12 at ¶ iii.

[5]Theoretically, the citizenship of the vessels' owners in an *in rem* action should be irrelevant so long as the *res* has sufficient contacts; clearly that is the case here.

2. EXTRATERRITORIAL KING CRAB MANAGEMENT IS A PROPER EXERCISE OF STATE CONSERVATION RESPONSIBILITIES AND DOES NOT INVOLVE AN AREA OF EXCLUSIVE FEDERAL RESPONSIBILITY

Appellants argue that "federal jurisdiction over king crab is exclusive, and any state regulation is prohibited by the Supremacy Clause. . . ." Jurisdictional Statement of Appellants at p. 10. This interpretation is based on the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §§ 1331-43. It is not well founded.

In its most recent decision under the OCSLA, this Court held that federal courts do not have exclusive jurisdiction over personal injury and indemnity actions arising under the Act. *Gulf Offshore Co. v. Mobil Oil Corp.*, ... U.S. ...., 49 U.S.L.W. 4920 (July 1, 1981). The Court reached this conclusion despite language in the Act which describes the Outer Continental Shelf as an area of "exclusive federal jurisdiction," 43 U.S.C. 1333(a)(1), and grants United States District Courts "original jurisdiction of cases and controversies arising out of or in connection with any operations conducted on the Outer Continental Shelf . . . ." 43 U.S.C. 1333(b). The Court noted that Congress rejected a suggestion by the Justice Department that the Federal Government should "have the exclusive control of lawmaking and law enforcement" on the Shelf. *Id.* ..... U.S. at ....., 49 U.S.L.W. at 4922, n. 9.

The OCSLA only preserves "the right of the United States to the natural resources of that portion of the subsoil and seabed lying seaward and outside [the territorial sea]." 43 U.S.C. § 1302. It does not address the superjacent water environment. Nevertheless, Appellants seek to include crab as natural resources of the seabed and subsoil because the OCSLA was initially introduced as an amendment to the Submerged Lands Act, and the latter covered fish and crab as well as oil, gas and minerals. Jurisdic-

tional Statement of Appellants at p. 12. However, the history of the legislation after the Submerged Lands Act and the OCSLA were severed and a review of pertinent judicial authority evidence no such intent.

A. The Outer Continental Shelf Lands Act Does Not Apply to King Crab

As noted by the Court in *Gulf Offshore Co.*, "[t]he legislative history confirms that the purpose of the OCSLA was to assert the exclusive jurisdiction and control of the Federal Government of the United States over the *seabed and subsoil* of the outer Continental Shelf, and to provide for the development of its vast *mineral resources.*" ..... U.S. at ....., 49 U.S.L.W. at 4921, n. 7, citing S. Rep. No. 411, 83rd Cong., 1st Sess. (1953) (emphasis added)[6]

Appellants rely primarily on statements by one senator as evidence of "exclusive federal control" (Jurisdictional Statement of Appellants at p. 13), but they omit citation to several of the same senator's comments that the exclusive federal control under the OCSLA does not apply to fisheries. Senator Cordon elaborated on the restrictive nature of federal authority under the OCSLA:

> . . . we are excepting from the operation of this act *all marine life above the land itself beneath the seas.*" S. Rep. No. 411, 83rd Cong., 1st Sess. (1953). (emphasis added)
>
> [I]t is the plain intent of this measure to leave navigation and fishing in the outer shelf areas exactly where they are now.
>
> • • •

[6]The Senate Report on the OCSL bill expresses Congress' concern only with oil, gas and minerals:

> The purpose of S.1901, as amended, is to assert the exclusive jurisdiction and control of the Federal Government of the United States over the *seabed and subsoil* of the outer Continental Shelf, and to provide for the development of its vast *mineral* resources." (emphasis added). S. Rep. No. 411, 83rd Cong., 1st Sess. (1953).

> There is a recognition from cover to cover, in the bill, of the Federal Government, but no change in the character of the waters nor with respect to fishing or navigation in them." 99 Cong. Rec. 6963-64 (1953).

Senator Douglas confirmed this narrow application of the OCSLA:

> We are not particularly interested in kelp, or shrimp or oysters, those are sideshows. The question is oil and gas. 99 Cong. Rec. 2868 (1953).

Even if the comments of one congressman could be used to determine the intent of the whole Congress,[7] the statements omitted by the Appellants from their Jurisdictional Statement overwhelmingly contradict the proposition that Congress intended to pre-empt the states from extraterritorial regulation of king crab.

The Act itself is also instructive and directs that it be interpreted "in such a manner that the character of the high seas of the waters above the outer Continental Shelf and the right to . . . fishing shall not be affected." 43 U.S.C. § 1332(b). In addition, the operative portions of the Act at 43 U.S.C. 1334 focus on leasing procedures which are appropriate only to oil, gas, and mineral extraction operations. For example, the terms "royalty oil and gas", "unitization", "pooling", "drilling agreements", "subsurface storage of oil or gas", etc. have no application to fishing activities for crab or other fisheries resources on the high seas. Similarly, amendments to the OCSLA have dealt only with oil and gas royalties, leasing procedures, and other matters that do not apply to fisheries resources. *See e.g.* Pub. L. No. 95-372; 92 Stat. 629 (1978).

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[7]Statements on the floor are not credible evidence of legislative intent. Sutherland, Statutory Construction, § 48.13 (Sands, 4th Ed. Rev.)

Scholarly commentary further confirms that the OSCLA does not apply to fisheries resources:

> One aspect of the Act that is quite noticeable today is that it contains no provisions indicating any real concern for or even awareness of values or uses other than *mineral ones,* and that it provides no procedure for the weighing of and determination of priorities among such values and uses. This is perhaps understandable in light of the history of the Act. There is abundant evidence that the primary, perhaps controlling purpose of the Act was to authorize and encourage the development of the vast reserves and highly potential prospects of *oil and gas* on the outer continental shelf. The Act itself states that the leasing power of the Secretary of the Interior was authorized "[i]n order to meet the urgent need for further exploration and development of the oil and gas deposits of the submerged lands of the outer Continental Shelf." (emphasis added)

R. Krueger, *The Background of the Doctrine of the Continental Shelf and the Outer Continental Shelf Lands Act,* 10 Natural Resources J. 442, 469 (1970).

The OCSLA's application only to minerals has also been specifically noted in judicial opinion. *See e.g., Guess v. Read,* 290 F.2d 622 (5th Cir. 1961), cert. denied 368 U.S. 957 (1962); *Treasure Salvors v. Abandoned Sailing Vessel,* 408 F. Supp. 910 (D. Fla. 1976); *United States v. Alexander,* 602 F.2d 1228 (5th Cir. 1979).

That Congress intended "natural resources" to refer only to minerals in the OCSLA is further supported by the historical use of the term "natural resources of the subsoil and seabed." This first appeared in Presidential Proclamation No. 2667, September 28, 1945, "Policy of the United States With Respect to Natural Resources of the Subsoil and Seabed of the Continental Shelf," 1945 U.S. Code Cong. & Ad. News 1199-1200. 10 Fed. Reg. 12303; Depart-

ment of State Bulletin Vol. 13, 1945, p. 484. Appendix G. Appellants fail to reproduce the first three paragraphs of the proclamation on pp. A-144 through 146 of their Jurisdictional Statement, so they miss the fact that "natural resources of the subsoil and seabed" means "petroleum and other minerals." In addition, Appellants omit consideration of Presidential Proclamation 2668, September 28, 1945, "Policy of the United States With Respect to Coastal Fisheries in Certain Areas of the High Seas," 1945 U.S. Code Cong. & Ad. News 200-01, 10 Fed. Reg. 12304, Department of State Bulletin, Vol. 13, 1945, p. 486. Appendix H. This companion proclamation on fisheries would not have been necessary if the reference to "natural resources of the subsoil and seabed" was intended to include fisheries resources that lived above the subsoil or in the superjacent waters.

B. Other Statutes, Treaties and Case Law Evidence No Federal Exclusivity in Fisheries Beyond Three Miles

Subsequent treaties with foreign countries have continued to confirm the distinction between minerals and fisheries resources for jurisdictional purposes. In 1958 the United Nations Conference on the Law of the Sea in Geneva adopted the Convention on the Continental Shelf (15 U.S.T. 471; T.I.A.S. 5578 (1964))establishing rules for seabed resources development beyond national limits of the territorial sea. The Convention was ratified by the United States and applies beyond traditional "natural resources of the subsoil and seabed" because coverage is specifically extended to "living organisms belonging to sedentary species." Art. 4. This treatment was necessary because the companion fisheries treaty[8] did not provide for exclusive coastal state (nation) jurisdiction over fisheries resources. Therefore, the Continental Shelf treaty

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[8]Convention on Fishing and Conservation of the Living Resources of the High Seas, adopted by the United Nations Conference on the Law of the Sea. 17 U.S.T. 138; T.I.A.S. 5969 (1966).

nations exercise coastal state jurisdiction over all living organisms that come into "constant physical contact with the seabed or subsoil." Art. 2, § 4.

Thus, the coverage of these two treaties is further evidence that the natural resources of the subsoil and seabed do not, unless specifically defined as in the Submerged Lands Act or the Fishing Convention, include living resources such as crab.

The oil and gas decisions of this Court on which Appellants rely for their assumption of exclusive federal jurisdiction never extend their coverage to living resources; further, the single circuit court case that did so only applied very narrowly to coral reefs, not to live king crab. That court, *United States v. Ray*, 423 F.2d 15, 19, 21 (5th Cir. 1970) adopted a district court finding that coral reefs "together with the organisms attached thereto, are 'natural resources' within the Outer Continental Shelf Lands Act, and the Geneva Convention on the Continental Shelf."

Even if the living coral organisms atop tons and tons of underlying coral skeletal deposits constitute a continental shelf resource, a coral reef that cannot move from place to place or undertake seasonal migrations across the three mile boundary of the territorial sea is wholly unlike a king crab that makes long migrations and even in juvenile pod formations never becomes a part of the sea floor but remains separate and distinct. Appendix I. Coral, on the contrary, live and die in the same reef location, and their skeletal remains persist permanently to become an established part of the seabed. If king crab remained stationary in one place during their life history, and if their carapaces (shells) did not decompose but, rather, accumulated over generations to contribute to some sort of king crab shell reef, then the *Ray* case and oil and gas cases might be worthy of consideration to determine if king crab are like mineral resources of the seabed and subsoil subject to exclusive federal jurisdiction. This is not, however, the case.

The Fishery Conservation and Management Act, 16 U.S.C. 1801 *et seq.*, gives the final, unequivocal assurance that king crab are not "federal citizens" of the continental shelf excluded from state conservation regulation. It establishes federal fisheries authority in a Fishery Conservation Zone (FCZ) from 3-200 miles seaward of the baseline in the United States. However, the authority is not exclusive. In the FCZ, foreign fishing vessels may be regulated by the federal government, but absent federal regulations, state conservation laws may still apply to vessels registered under the laws of the coastal state. 16 U.S.C. § 1851(a). Appendix F.

If Congress had intended the OCSLA to establish exclusive federal jurisdiction over fishery resources, it is inconceivable that Congress would have ignored the OCSLA when it approved extraterritorial state management authority over vessels registered under the laws of the state in the Fishery Conservation and Management Act. Yet, the Fishery Conservation and Management Act deliberations include no suggestion that 25 years of federal control was being upset. To the contrary, federal authorities continue to acknowledge that, even at the present time, state regulations in the territorial sea and beyond are necessary for the conservation of king crab. *Bundrant*, 546 P.2d at 540; Appendix O.

State management will be replaced under the preemption doctrine of the supremacy clause only if there arises a conflict between state and federal fisheries regulations. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); *Douglas v. Seacoast Products, Inc.*, 431 U.S. 165 (1977); *Skiriotes v. Florida*, 313 U.S. at 69; *Toomer*, 334 U.S. at 393; *Manchester v. Massachusetts*, 139 U.S. 240, 266 (1890); *Corsa v. Tawes*, 149 F. Supp. 771, 773 (D. Md. 1957), citing *Cooley v. Board of Wardens*, 53 U.S. 299 (1851); *F/V American Eagle v. State*, 620 P.2d 657, 662 at footnote

10 (Alaska 1980); *Weeren,* 155 Cal. Rptr. at 794; Appendix F. So far Tanner crab, but not king crab have been the subject of Federal regulations under the FCMA. 50 C.F.R. § 671.

Appellants' argument for federal exclusivity would create an untenable void in regulatory control of fisheries beyond three miles and invalidate all pending and past enforcement actions. Under their argument, fisheries beyond three miles would be an unregulated "no-man's land" wherein fishermen could roam without regard to conservation principles unless the federal government had affirmatively undertaken to regulate a particular fishery.

Such an absurd result was not even considered in the pre- and post-Fishery Conservation and Management Act fisheries cases cited earlier which based extraterritorial jurisdiction over fish on sufficiency of state contracts. *See, e.g., Skiriotes,* 313 U.S. at 69; *Bayside Fish Flour Co. v. Gentry,* 297 U.S. 422 (1936); *Hjelle,* 377 F. Supp. at 430; *Felton v. Hodges,* 374 F.2d 337 (5th Cir. 1967); *People v. Foretich,* 92 Cal. Rptr. 481 (Cal. 1970); *Weeren,* 163 Cal. Rptr. at 255; *Moos,* 568 P.2d at 793; *Gherra v. California Fish and Game Dept.,* unpublished 1973 opinion cited in *Bundrant,* 546 P.2d at 550.

In summary, the OCSLA does not consider fish and crab species to be "natural resources of the seabed and subsoil." Accordingly, their management is not an area of exclusive federal jurisdiction precluding all state conservation regulations even in the absence of federal management. Appellants have failed to draw any substantial question as to such an application of the OCSLA.

3. ALASKA'S COMMERCIAL KING CRAB REGULATIONS FOR FISHING IN THE EGG ISLAND DISTRICT GIVE ADEQUATE NOTICE OF PROHIBITED CONDUCT AND ARE NOT VAGUE

A. Introduction

Appellants make two vagueness arguments:

(1) Alaska's commercial king crab regulations give no notice of application beyond three miles;

(2) two lower court decisions found other king crab regulations void for vagueness.

These conclusions result from an incomplete reading of the regulations and misinterpretation of the lower court decisions. If Appellants read the regulations as a whole, without selectively highlighting isolated sections, their application to Appellants' activities becomes obvious. *See United States v. Alexander*, 602 F.2d 1228, 1231 (5th Cir. 1979); *LaBauve v. Louisiana Wildlife and Fisheries Commission*, 444 F.Supp. 1370, 1381 (D.La. 1978). Further, Appellants have overlooked the fact that the lower court cases they rely on all involved king crab regulations in shallow Bering Sea areas where, unlike the Egg Island District, no outer boundary had been specified. See Jurisdictional Statement of Appellants, Appendix H at A-103.

B. Alaska's Commercial King Crab Regulation for the Egg Island District Gave Adequate Notice That Fishing Was Prohibited In January, 1976

At the time of the F/V American Eagle violations, Alaska's king crab regulations had been redrafted to clarify the earlier, pre-*Hjelle* jurisdictional definition of "waters seaward of that officially designated as the territorial waters of Alaska," as discussed further below. 5 AAC 36.040; *Hjelle*, 377 F.Supp. at 433; *Bundrant*, 546 P.2d at 533. The new regulations reflected the State nexi with the offshore king crab resources, their purpose being to protect and maintain the king crab resources of the State in all parts of the regulated area. 5 AAC 34.005(c).

Nowhere is their application restricted to waters inside three miles. On the contrary, the seaward boundary of Statistical Area O is unambiguously defined as 800 fathoms (5 AAC 34.600) and the definition of the Egg Island District in 5 AAC 34.605(c) encompasses "all waters of statistical area O."

In accordance with Alaska Statute 16.05.920(a), commercial fishing activities in all areas are prohibited unless permitted by law or regulation. The fishing season in the Egg Island District had been opened at 12:00 noon on November 1, 1975 (5 AAC 34.610), but Emergency Order 20, issued under authority of AS 16.05.060, closed the district on November 7, 1975, nearly a full two months before the F/V American Eagle violations. Appendix B.

Nothing in the regulations nor the emergency order in this case confined their application to waters within the three mile limit. To the contrary, all applied to waters within and beyond three miles in the Egg Island District. *State v. Bundrant*, 546 P.2d at 551.

C. Appellants Erroneously Assume that the Vagueness Involved in the Bering Sea Cases Applies to the Egg Island District

The two Bering Sea cases cited by Appellants involved vagueness in regulatory language failing to define the outer limits of the Bering Sea. Jurisdictional Statement of Appellants at Appendices G and H. The questioned regulations for the Bering Sea fishery did not indicate the seaward extent of the fishing area, and the trial court judge feared they might "have no boundary except the shores of a foreign country bounding the opposite side of the Sea." Jurisdictional Statement of Appellants at Appendix G, p. A-103. The Egg Island District closure is not subject to any ambiguity because it only extended to waters within an outward boundary defined by the 800

fathom isobath. 5 AAC 34.605(c); 5 AAC 34.600. Consequently the lower court cases on the Bering Sea and a Fish and Game Commissioner's remark that the Bering Sea registration area had no precisely defined outer limit have no application to the Egg Island District. Appellants have, therefore, failed to raise a substantial challenge to the Egg Island regulations, and this Court should not invalidate the state's emergency orders terminating fishing in the Egg Island District on November 7, 1975. The Alaska court readily found that "the Emergency Orders issued by the state prior to the American Eagle's activities in the Egg Island district left little question that the entire district was closed to king crab fishing as of November 7, 1975." *F/V American Eagle*, 520 P.2d at 364.

4. ALASKA'S FORFEITURE PROCEDURES SATISFIED DUE PROCESS

A. Introduction

Appellants argue that the forfeiture of the bond that was stipulated for the release of the F/V American Eagle denies due process because:

1. the forfeiture statute does not specify *in rem* procedures or a post-seizure hearing;
2. the trial took place in Kodiak, Alaska 18 months after the seizure;
3. the owners were deprived of their vessel from January 15-February 10, 1976 and suffered "irreparable injury" because the proceeds from the five days of fishing in the Egg Island District were put in a trust account pending a final decision; and
4. the forfeiture affected the interests of two owners who were not aboard the vessel at the time of the seizure.

Each of these objections has been settled by previous decisions of this Court, and the cases cited by Appellants fail to support their assertion that the action against the F/V American Eagle and the $100,677.50 in proceeds of

king crab taken two months after a season closure constituted a denial of due process.

B. Necessity of a post-seizure hearing

Appellants do not deny that vessel seizures may omit pre-seizure notice in accordance with *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), but they argue that a post-seizure opportunity to contest the seizure must be provided in the context of the forfeiture statute itself. Jurisdictional Statement of Appellants at p. 21. They reject the reasoning of the Alaska supreme court that Alaska Rule of Criminal Procedure 37(c) provides an "immediate and unqualified right to contest the state's . . . seizure" (*F/V American Eagle*, 620 P.2d at 667) because they erroneously conclude "Criminal Rule 37(c) expressly does not apply to a civil in rem proceeding". Jurisdictional Statement of Appellants at p. 22. However, Alaska's highest court, like this Court, has specified that "forfeitures, even when civil in form, are basically criminal in nature." *Boyd v. United States*, 116 U.S. 616 (1886); *F/V American Eagle*, 620 P.2d at 667, footnote 25; *Graybill v. State*, 545 P.2d 629, 631 (Alaska 1976), citations omitted. Therefore Criminal Rule 37 is a valid standard for release procedures.

The Alaska court found that the search and seizure warrant obtained under AS 16.05.190 and .195 on January 10, 1976 was based on valid, applicable criminal rules which provided an immediate procedure for testing the seizure. *F/V American Eagle*, 620 P.2d at 667. There is simply no merit to Appellants' contention that they had no opportunity to seek an immediate release. Indeed, as set out below, they intentionally declined to do so.

C. Delays

Appellants also argue that the 25 days that the vessel was detained and the postponement of trial for 18 months represent a denial of due process. However, those delays

were a result of Appellants' own negotiations and strategy in the litigation and were associated with immediate settlement and release discussions between the parties following the seizure. They deserve little consideration. *F/V American Eagle*, 620 P.2d at 667.

Settlement did not occur, and the State finally filed the complaint for forfeiture on January 27, 1976, even though the settlement stipulation agreed to by the parties at ¶ 8 indicates the parties' discussions initially contemplated a more timely, simultaneous filing of the complaint and a release document. *Id.* at 669, fn. 30. Throughout these discussions the parties sought only an out-of-court release agreement. At no point did Appellants take action, either under Criminal Rule 37(c) or in the context of the subsequent civil litigation, to obtain a court-ordered release. Instead, they worked on a stipulation for release that was signed on February 10, 1976. Their suggestion that the bond was obtained "on the State's own terms" (Brief of Appellants at p. 25)[9], is in error because the final stipulation for release of the vessel reflected only the owners' estimate of $350,000 (R.567), even though the State's estimate was $850,000 (R.575) and subsequent insurance papers showed a $1,300,000 value. R.667.

Even after release, Appellants continued delaying tactics. For example, although Rule 12 of the Alaska Rules of Civil Procedure requires an Answer within twenty days (i.e. February 16, 1976), Appellants wrote the Attorney General's Office on April 9, 1976 that "We expect to be filing an answer during the next few weeks. As you know, I will be out of state for most of the time during the next month." Appendix K. Their answer was finally filed on May 10, 1976.

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[9]Appellants also suggest that "vessel seizures are a common enforcement measure", but actually they are only called upon in the most egregious cases (R. at File No. 14, Brief of Appellees at p. 51), and have only numbered five king crab vessels since 1976. Appendix J.

On October 26, 1976, 22 days after this Court indicated it would not review extraterritorial jurisdiction over king crab which had been approved in *Bundrant*, the parties discussed a trial date. Appendices L and M. Trial was set for March 29, 1977 in Kodiak, Alaska. Appendix N.

At the last minute, Appellants filed a lengthy trial brief requesting dismissal on the basis of alleged regulatory defects. R.72-92. The State asked for a postponement of the impending trial to allow time to submit responses to these challenges and avoid inconvenience to witnesses. R.105-111. The trial judge agreed that these last-minute motions should not be hastily dealt with, and the trial was reset for July 22, 1977. TR.86-88.

Thus, Alaska's rules did provide for a prompt post-seizure hearing, and delays that postponed the trial date until July, 1977 are the sole result of Appellants' voluntary actions. This does not rise to a substantial due process question.

D. Post-Seizure Hearings

Appellants also argue that forfeiture statutes must include a special provision for hearings. However, the cases they cite for this proposition all involve administrative actions or situations where there has been no judicial supervision of the seizure. See Jurisdictional Statement of Appellants at p. 22. For example, *Barry v. Barchi*, 443 U.S. 55 (1979), relied on by Appellants at pp. 21 and 15, involves summary suspension of a horse racing license by an administrative agency which failed to provide for a prompt post-suspension hearing, and the respondent's license remained suspended pending final decision. No judicial monitoring or opportunity for immediate review of the agency action was provided, unlike the situation for the owners of the F/V American Eagle who had the opportunity for a post-seizure hearing and did not have their licenses suspended or revoked.

Further, the owners' complaint that their property should not have been the subject of release negotiations "for almost four weeks without hearing" because of its value to "the owner in earning a livelihood" is without merit because the fishing grounds were in any event closed to commercial king crab harvests during that period. See Appendix E. If the grounds had been open, Appellants probably would not have instigated the delays mentioned above, or have taken their vessel to Pelican, more than 800 miles from the Egg Island District and on the route to their home port in Seattle.

Appellants incidentally complain that Kodiak was inappropriate venue, though they did not argue this point on appeal to the Alaska supreme court. Brief of Appellants at 22. However, Alaska law provides for venue in "the judicial district in which the claim arose" (AS 22.10.030 (b)); Kodiak was appropriate because it is in the same judicial district as the Egg Island District and the F/V American Eagle had earlier entered Port Lions, only about 25 miles from Kodiak. In addition, Kodiak best served the "convenience of the parties and witnesses" (AS 22.10.030 (d)), who were located in Dutch Harbor, Kodiak, Anchorage, Juneau, Petersburg, Seattle, and Virginia. The American Eagle had no contacts with Pelican, where the boat was seized, except that it made its last delivery of the season there.

E. Interests of Innocent Owners

Appellants refer to the recent decision of the Alaska supreme court in *State v. Rice*, 626 P.2d 104 (Alaska 1981), to plead that two of the owners who were not on board when the violation occurred should not be subject to the penalty imposed on the vessel. Jurisdictional Statement of Appellants at 25. However, remission procedures only apply to an innocent owner who shows "not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be

expected to prevent the proscribed use of his property." *Id.* at 111 citing dicta in *Calero-Toledo*, 416 U.S. at 689.

Calero-Toledo clearly upholds forfeiture of the interests of third parties—including the owners of a vessel leased without knowledge it would be used for drug trafficking. *Calero-Toledo* suggests, in dicta, that an exception might be created for a truly innocent owner who did all that was reasonably possible to prevent illegal use of the property.

The two "innocent" owners of the F/V American Eagle simply do not qualify for this exception. The *Rice* court, 626 P.2d at 111, footnote 24, noted that these owners were active business partners. Therefore, unlike the financing institution in *Rice*, they can profit immensely when $100,677.50 of king crab are taken in five days from a closed area. If the Alaska supreme court had excluded fishing partners from the operation of the forfeiture, cross-leasing of vessels to ensure that no owner ever operates a vessel in which he has an interest would frustrate future forfeiture actions.

Part of Appellants' theory of innocence appears to be based on a significant oversight in their evaluation of the Alaska supreme court opinion on this point. They intimate that two owners were given special, harsh treatment because they had previously filed challenges to the State's king crab regulations in the Bering Sea. Jurisdictional Statement of Appellants at p. 24. Inexplicably, they ignore the court's comments that Hjelle and Hansen were not only experienced fishermen well aware of the operations of their vessels, but that Hjelle had also engaged in significant operations in the Egg Island District during the season. *F/V American Eagle*, 620 P.2d at 668, 672.

Such a situation as this, where the owners know and desire that a vessel be used in king crab operations, and stand to profit from the venture, is unlike remission cases

where the innocent owner of a vehicle has no idea that, for example, a car will be used to smuggle alcohol or drugs. *Lee v. Thornton*, 538 F.2d 27 (2d Cir. 1976). Remission might be applicable to owners Hjelle and Hansen if the forfeiture action had stemmed from illegal conduct not related to fishing, such as possession of drugs or other contraband material and they had not otherwise profited from use of the vessel.

Thus, owners Hjelle and Hansen were not mere innocent owners, and Appellants have failed to raise a substantial reason for this Court to reassess its decision in *Calero-Toledo*. Also, Appellants do not raise substantial due process issues.

F. Deprivation of Vessel and Proceeds Does Not Constitute Denial of Due Process

Appellants argue that temporary loss of the vessel from the time of seizure until a release agreement was reached between the parties also denies due process. However, due process is denied only when the interests of the owner exceed the state's interests. *Barry v. Barchi*, 443 U.S. at 63-66.

The need to detain vessels to insure that release will not frustrate the forfeiture litigation has most recently been reiterated in *Calero-Toledo*, and applied in the *F/V American Eagle*, 620 P.2d at 668. The owners' interests in retrieving the vessel, when king crab fishing was not even permitted after January 10th, is not persuasive to subordinate the State's need to assure that the F/V American Eagle will not continue to disregard Alaska's conservation laws closing fishing grounds to further harvest. No irreparable injury could attach during the negotiation period unless the owners assumed they could continue to sidestep Alaska's jurisdiction over king crab by ignoring Alaska's fishery conservation laws.

Similarly, the owners' agreement to place the $100,677.50 in proceeds from the seized crab in an interest-bearing account pending a final decision in the litigation does not deny any due process "right" to use the proceeds. Unlike the taxpayer's savings in *Commissioner v. Shapiro*, 424 U.S. 614 (1976) (Jurisdictional Statement of Appellants at 24), the proceeds in this case were the direct result of an illegal activity. In addition, the owners could hardly suffer irreparable injury when the $100,677.50 represented windfall profits they would not have received if they had followed Alaska's conservation laws.

Finally, there is no merit to Appellants' allegation that "Alaska routinely refuses to negotiate a bond or demands a bond at an unrealistic level, often twice the value of the vessel." Jurisdictional Statement of Appellants at p. 25. Only five vessel seizures have occurred since the 1975 season. Appendix J. No case can be cited where the State has denied a bond, settlement, or the opportunity for petition to the court under Criminal Rule 37.

In summary, the owners' negotiations for release of the vessel evidences their conscious decision not to call upon the more rapid release procedure of Criminal Rule 37(c), or to petition for release in the civil case before they presented the trial court with the stipulation for release and the agreement to hold the proceeds in an interest-bearing account, R. 567. Their election to deal directly with the State to achieve a stipulation instead of arguing in court hardly constitutes a denial of due process.

CONCLUSION

Appellants have failed to raise substantial federal questions meriting this Court's review because:

1. Extraterritorial jurisdiction over fishing resources and fishermen having sufficient contacts with the State is well established. It is not necessary for this Court to reiterate that the magic of "citizenship"

is not the only jurisdictional nexus that obligates fishermen to abide by applicable state conservation rules. Moreover, the State's regulations closing the Egg Island District adequately informed crab fishermen of their meaning.

2. It is well established that forfeiture actions are quasi-criminal in nature and this Court's review is not necessary to confirm the application of Alaska's Criminal Rule 37 to seizure warrants.

3. Finally, Appellants' arguments regarding due process deprivations are without merit; by virtue of their profit from the crabbing venture, the owners do not fit within the "innocent owner" dicta of *Calero-Toledo*. Delays and other procedural events were all brought about by Appellants themselves.

This appeal should be summarily dismissed, or if considered as a petition for certiorari, this Court should not exercise its review authority, because Appellants' arguments on appeal do not raise substantial questions as to the State's authority to enforce reasonable conservation laws beyond three miles. Alternatively, the decision of Alaska's supreme court should be affirmed.

Dated this 31st day of July, 1981.

Respectfully submitted,

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(Appendices follow)

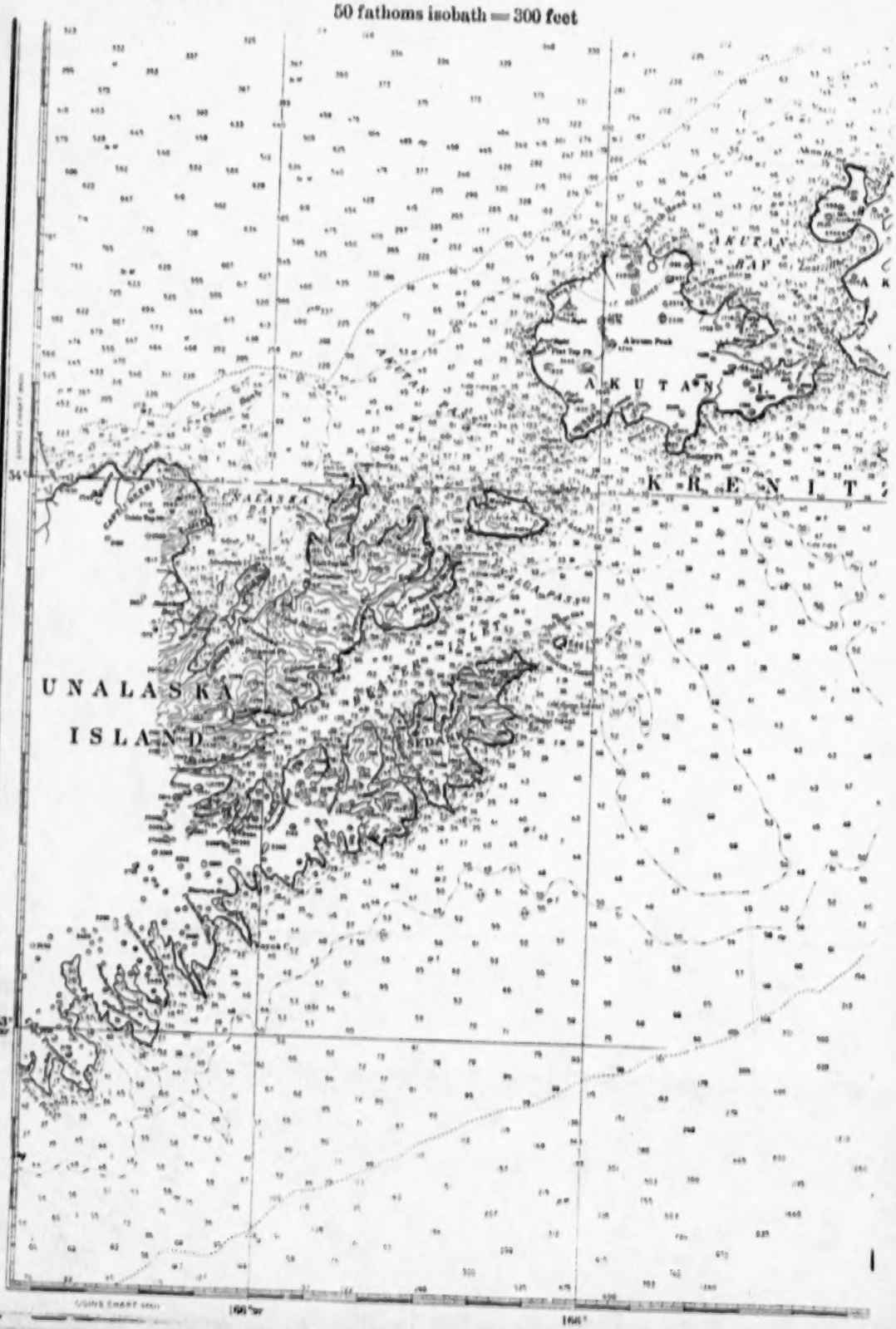
Appendix A

United States Coast and Geodetic Survey

CHART NO. 8860

Depth in fathoms

50 fathoms isobath = 300 feet



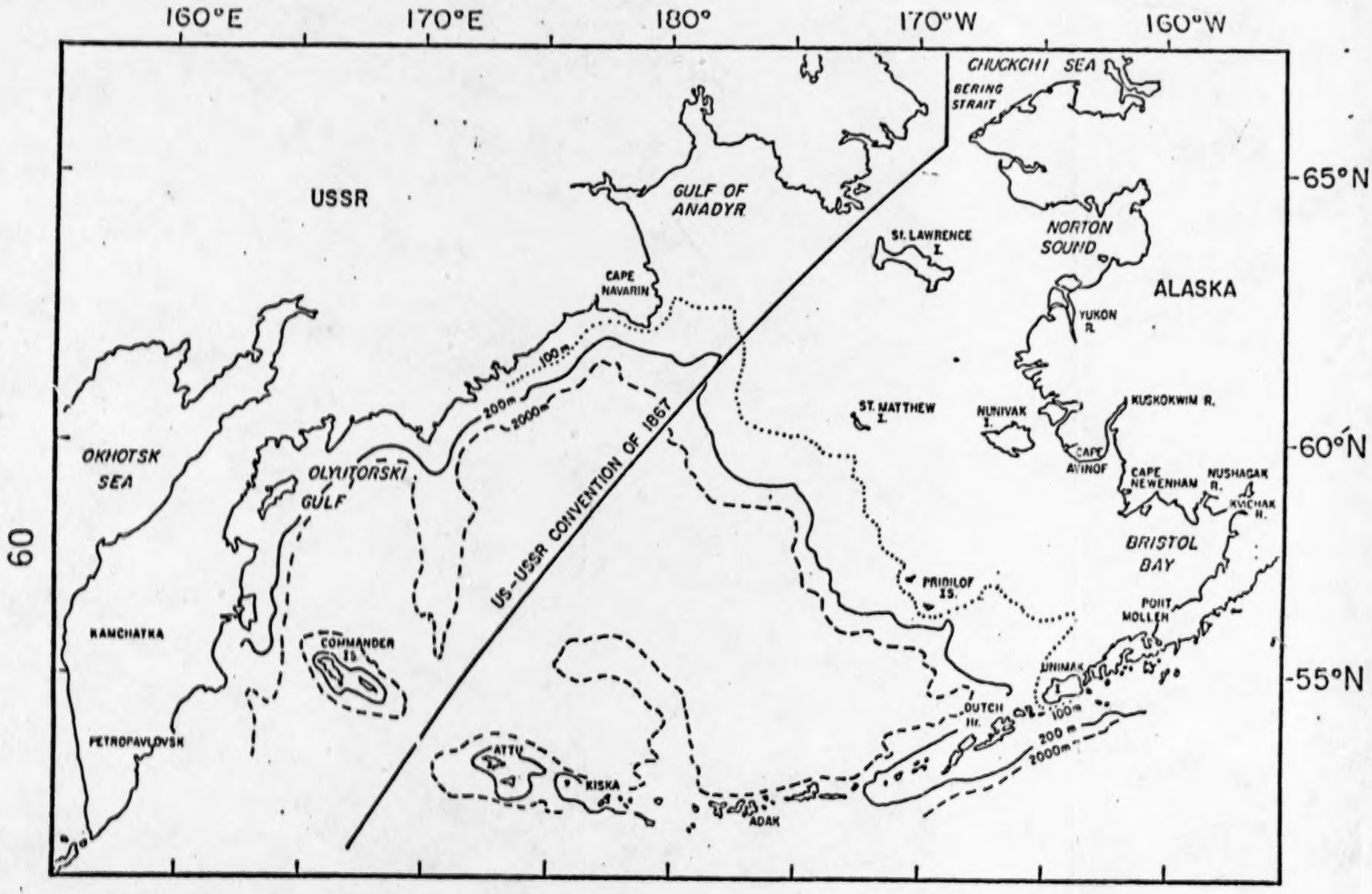


Figure 2.--Geographical locations in the eastern Bering Sea and Aleutian Islands.

Appendix B

State of Alaska
Department of Fish & Game
P.O. Box 686—Kodiak 99615
Division of Commercial Fisheries

November 4, 1975

Westward Region 1975 Shellfish Field
Emergency Order No. 20

JUSTIFICATION:

The present level of catch and rate of fishing success indicate that the desired king crab catch for the Egg Island district of statistical area O will be attained by 12:00 noon November 7.

The same analysis of data for the Bering Sea (statistical area Q) king crab fishery indicates that the desired harvest of red king crab will be attained by 12:00 noon November 14.

Therefore, the Egg Island district of area O will close to king crab fishing after 12:00 noon November 7 and the Bering Sea will close too fishing for red king crab after 12:00 noon November 14.

EMERGENCY ORDER:

Under authority of AS 16.05.060 the following emergency order is adopted effective November 4, 1975:

5 AAC 34.610. FISHING SEASONS. and 34.910. FISHING SEASONS. (b) shall be amended to read as follows:

5 AAC 34.610. FISHING SEASONS. King crab may be taken or possessed:

(a) from 12:00 noon November 1 until 12:00 noon November 7 in the Egg Island district,

(b) from 12:00 noon November 1 through February 15 unless closed earlier by emergency order in the remainder of statistical area O.

5 AAC 34.910. FISHING SEASONS.

(b) red and brown king crab may be taken or possessed from August 1 through 12:00 noon November 14.

ALASKA DEPARTMENT OF
FISH AND GAME
James W. Brooks, *Commissioner*

/s/ DUANE E. PHINNEY
By: Duane E. Phinney
Regional Shellfish Biologist
Westward Region

Appendix C

State of Alaska
Department of Fish & Game
P.O. Box 686—Kodiak 99615
Division of Commercial Fisheries

November 18, 1975

Westward Region 1975 Shellfish Field
Emergency Order No. 23

JUSTIFICATION:

Analysis of data from the Dutch Harbor king crab fishery indicate that the desired catch from the southwest portion of the Akun district of area O has been attained. Therefore, that portion of the district south of 54° 05′ N. lat. and west of 165° 05′ W. long. will close to king crab fishing after 12:00 noon November 20.

Severe weather continues to prevent fishermen from removing their gear from that portion of the Central district of area M that is scheduled to close. A 48-hour extension of the season is hereby granted.

EMERGENCY ORDER:

5 AAC 34.610. FISHING SEASONS. and 5 AAC 34.635. CLOSED WATERS. and 5 AAC 34.535. CLOSED WATERS. shall be amended to read as follows:

5 AAC 34.610. FISHING SEASONS. King crab may be taken or possessed from 12:00 noon November 1 through February 15 unless the registration area is closed earlier by emergency order.

5 AAC 34.635. CLOSED WATERS. King crab fishing is prohibited:

(a) after 12:00 noon November 7 in the Egg Island district,

(b) after 12:00 noon November 20 in that portion of the Akun district south of 54° 05′ N. lat. and west of 165° 05′ W. long.

5 AAC 34.535. CLOSED WATERS. King crab fishing is prohibited after 12:00 noon November 10 in those waters inside a line from Bold Cape to the northernmost point of Cherni Island to the southernmost point of Kennoys Island to Acheredin Point to the northernmost point of Andronica Island to the southernmost point of Karpa Island to Renshaw Point.

ALASKA DEPARTMENT OF FISH AND GAME
James W. Brooks, *Commissioner*

/s/ DUANE E. PHINNEY
By: Duane E. Phinney
Regional Shellfish Biologist
Westward Region

Appendix D

State of Alaska
Department of Fish & Game
P.O. Box 686—Kodiak 99615
Division of Commercial Fisheries

December 15, 1979

Westward Region 1975 Shellfish Field
Emergency Order No. 28

JUSTIFICATION:

The 1975-76 king crab season in the Westward Region has been a large overall success, with a total harvest of nearly 90,000,000 pounds. Record recent-years catches have been attained in some areas and districts and stocks are in good condition. The harvest levels have been attained in such areas and districts and the season closed.

Other areas, however, remain open with indications in most instances that the stocks are at less satisfactory levels. The present status of the king crab fisheries in these areas was evaluated and the decision has been made to close most of the areas after 12:00 noon December 18 for the remainder of the season. For example, the Adak area has shown a continued decline in crab abundance in recent years. Vessels fishing the area in November failed to find any sign of recovery; suggesting further decline. Removal of any significant number of crabs might reduce the population to such a low level that it could never recover. Therefore the general crab season at Adak will close after 12:00 noon December 18 and an alternate means will be devised to evaluate the crab population level. The Western Aleu-

tians area has always been managed in conjunction with the Adak area and the populations have reflected Adak in condition and the area will also close at 12:00 noon December 18.

The total catch for the Dutch Harbor Area is approaching the upper end of the anticipated harvest range. Three districts remain open. The Akutan district catch the past two seasons has fallen far below the catches taken in prior years and the harvest should be limited to allow recovery of the stocks to former levels of production. Extensive fishing in the Unalaska district has failed to discover any abundance of crab. The Western district has likewise failed to reach the expected level of production. The only crab that have been discovered in the latter two districts are large and no sub-legal males have been discovered. Thus, these older crabs are the only potential breeders and should be protected. The Western district has traditionally reached its peak in production later in the season and will remain open until 12:00 noon January 10. The Akutan and Unalaska districts will close at 12:00 noon December 18.

The normally productive portion of the Central district of area M was previously closed because of low abundance. Fishermen have failed to find any abundance of crab in that portion of the district still open. Extensive fishing in the Unimak Bight district has failed to find any significant abundance of crabs and the catch has lagged well behind expected levels in this previously productive area. The Cingnik district has likewise failed to produce any significant sign of crab. Therefore area M will close to king crab fishing after 12:00 noon December 18.

EMERGENCY ORDER:

Under authority of AS 16.05.060 the following emergency order is adopted effective December 14, 1975:

5 AAC 34.510. FISHING SEASONS. King crab may be taken or possessed from 12:00 noon August 15 until 12:00 noon December 18.

5 AAC 34.610. FISHING SEASONS. King crab may be taken or possessed from 12:00 noon November 1 until 12:00 noon January 10.

5 AAC 34.635. CLOSED WATERS.

(c) after 12:00 noon December 18 in the Akutan and Unalaska districts.

5 AAC 34.710. FISHING SEASONS. King crab may be taken or possessed from 12:00 noon November 1 until 12:00 noon December 18.

5 AAC 34.810. FISHING SEASONS. King crab may be taken or possessed from 12:00 noon November 1 until 12:00 noon December 18

ALASKA DEPARTMENT OF
FISH AND GAME
James W. Brooks, *Commissioner*

/s/ DUANE E. PHINNEY
By: Duane E. Phinney
Regional Shellfish Biologist
Westward Region

Appendix E

State of Alaska
Department of Fish & Game
P.O. Box 686—Kodiak 99615
Division of Commercial Fisheries

January 11, 1976

Westward Region 1975 Shellfish Field
Emergency Order No. 32

JUSTIFICATION:

Westward Region 1975 Shellfish Field Emergency Orders No. 1—31 were issued during the year to regulate the shellfish fisheries of the Westward Region. These remain in effect until rescinded. Some of these no longer are needed whereas others must remain in effect for a time. Therefore, the following emergency order is adopted effective January 11, 1976:

EMERGENCY ORDER:

Westward Region 1975 Shellfish Field Emergency Orders No. 1 through 6 (including 3A) and 8 through 29 (including 17A) are rescinded effective immediately and No. 30 and 31 are rescinded effective March 1, 1976.

ALASKA DEPARTMENT OF
FISH AND GAME
James W. Brooks, *Commissioner*

/s/ DUANE E. PHINNEY
By: Duane E. Phinney
Regional Shellfish Biologist
Westward Region

Appendix F

United States Department of Commerce
National Oceanic and Atmospheric Administration
3300 Whitehaven Street, N.W.
Washington, D.C. 20235

January 29, 1981

To: F—Terry L. Leitzell

From: GCF—Jay S. Johnson

Subject: Supersession and Jurisdictional Operations Under § 306 of the Magnuson Act, 16 U.S.C. § 1856

QUESTIONS PRESENTED:

(1) Under what circumstances may federal fisheries regulations supersede State fisheries laws?

(2) To what extent may States regulate fishing in the fisheries conservation zone (FCZ) established under the Magnuson Fishery Conservation and Management Act, 16 U.S.C. §§ 1801 *et seq*?

CONCLUSIONS:

(1) Federal fisheries regulations will supersede State authority over fishing

(a) in the FCZ under the supremacy clause of the United States Constitution except as provided in (2), below, and

(b) in the territorial sea after an administrative finding that State action substantially and ad-

versely affects accomplishment of a fishery management plan (FMP) for a fishery predominately fished in the FCZ.

(2) A State may regulate the fishing of vessels in the FCZ only when:

(a) the vessel is "registered" under the laws of the same State; and

(b) such regulation is not inconsistent with any applicable federal regulation; and

(c) the State has a legitimate interest in the fishery; and

(d) the State regulation neither discriminates against citizens of other States nor unduly burdens the interstate commerce of the United States.

BACKGROUND:

In the Magnuson Fishery Conservation and Management Act (Magnuson Act), 16 U.S.C. §§ 1801 *et seq.*, the United States established exclusive jurisdiction over a fishery conservation zone (FCZ). The outward boundary of the FCZ is a line 200 nautical miles from the baseline of the United States; its inner boundary is a line coterminous with the seaward boundary of each Coastal State (normally three miles from the baseline). The waters between the Coastal State boundaries and the baseline (the territorial sea) are not part of the FCZ and therefore are not generally subject to federal fisheries management. The Act does, however, prohibit foreign vessels from fishing in the territorial

sea or internal waters of a State, 16 U.S.C. § 1857. "Fishing" as defined by the Act includes harvesting and support operations conducted "at sea". 16 U.S.C. § 1802(10). NOAA has previously determined that the operations of foreign support vessels within the internal waters of a State, as distinct from the territorial sea, are not subject to this restriction because such vessels are not at sea. [Letter William C. Brewer, Jr., General Counsel, NOAA, to Robert C. Ely, Esq., November 25, 1977.]

The Magnuson Act recognizes the importance of fishing both to the Coastal States and to the Nation. It leaves management in the territorial sea generally to the States and recognizes State interest in management of the FCZ by providing for State participation on regional fishery management councils. The Councils prepare fishery management plans (FMPs) that are approved and implemented by the Secretary of Commerce if they are consistent with national standards.

FMPs developed for the FCZ by the Councils with State participation are intended to address regional concerns affecting the citizens and resources of more than one State in a consistent manner. It is obvious that FMPs would be of little value if any State could regulate FCZ fishing in a manner contrary to that of the FMP.

The Magnuson Act provides at 16 U.S.C. § 1856 that:

> (a) Except as provided in subsection (b), nothing in this Act shall be construed as extending or diminishing the jurisdiction of authority or any State within its boundaries. No State may directly or indirectly regulate any fishing which is engaged in by any fishing

vessel outside its boundaries, unless such vessel is registered under the laws of each State.

(b) (1) If the Secretary finds, after notice and an opportunity for a hearing in accordance with section 554 of title 5, United States Code, that—

(A) the fishing in a fishery, which is covered by a fishery management plan implemented under this Act, is engaged in predominately within the fishery conservation zone and beyond such zone; and

(B) any State has taken any action, or omitted to take any action, the results of which will substantially and adversely affect the carrying out of such fishery management plan;

the Secretary shall promptly notify such State and the appropriate Council of such finding and of his intention to regulate the applicable fishery within the boundaries of such State (other than its internal waters), pursuant to such fishery management plan and the regulations promulgated to implement such plan.

(2) If the Secretary, pursuant to this subsection, assumes responsibility for the regulation of any fishery, the State involved may at any time thereafter apply to the Secretary for reinstatement of its authority over such fishery. If the Secretary finds that the reasons for which he assumed such regulation no longer prevail, he shall promptly terminate such regulation.

No federal litigation requiring application of § 1856 has yet arisen. Recent cases in three States, however, have

brought these provisions to the attention of State courts, *People v. Weeren*, 26 Cal.3d 654, (1980); *State v. Nelson*, No. C-2093, (Pacific County Super. Ct., Wash., April 29, 1980); *F/V American Eagle v. Alaska*, No. 2221 (Alaska S.Ct., November 21, 1980). While these cases have reached consistent results, there is still much uncertainty concerning the implications of § 1856 with respect to continued validity of traditional State fishery management regimes. Increasing public concern regarding the actual need for and costs associated with federal regulatory actions is also a factor, since to the extent that States having adequate fishery conservation and management regimes are not impaired by federal law or regulatory actions, the less will be the need for federal intervention. With these concerns in mind, several legislators, Councils, NOAA regional attorneys and the Alaska attorney-general's office have requested clarification of the constitutional principles and jurisdictional operations of § 1856. In response to these requests and in the light of judicial attention, this memorandum has been drafted.

1. State Fishery Jurisdiction

(a) Origins

Authority to regulate the use and development of natural resources is within the police power of the States. *See generally, Barbier v. Connolly*, 113 U.S. 27, 31 (1884). For the conservation of both public fishery rights and marine resources thereby exploited, such police power extends over fisheries within State boundaries and is equally enforceable against legal residents and nonresidents. *Smith v. Maryland*, 18 How. 71 (1855); *Manchester v. Massachusetts*, 139

U.S. 240 (1891). Such conservation power may not, however, be enforced within State boundaries so as to discriminate against citizens of other States, *Douglas v. Seacoast Products*, 431 U.S. 256 (1976), or for the special benefit of a State's own citizens. *Hughes v. Oklahoma*, 441 U.S. 322 (1979). Nor may the exercise of police power conflict with federal law or unduly burden interstate commerce. *Bayside Fish Flour v. Gentry*, 297 U.S. 422 (1936).

(b) Extraterritorial State Jurisdiction Before the Magnuson Act

Prior to the Magnuson Act, on the basis of legitimate governmental interests, Coastal States could exercise marine police power beyond their boundaries, indirectly by means of landing laws, or directly through laws applicable to State citizens and to non-citizens with sufficient contacts with the State to subject themselves to State jurisdiction.

(i) Landing Laws

State landing laws directly regulate the possession, sale, transport or other disposition of fishery resources within the State. Such laws indirectly control exploitation of such resources inside and beyond a State's territorial sea. In the leading landing law decision, *Bayside Fish, supra,* the United States Supreme Court upheld a California law which regulated the disposition of sardines landed within the State regardless of whether the fish were taken inside or beyond State waters. The Court found that the statute was directed primarily toward conservation of a local food source, which was a reasonable State interest. Moreover, the California law did not conflict with any federal law or unduly impede the flow of interstate commerce.

The extraterritorial impacts of a landing law can thus be justified on the ground of a Coastal State's conservation interest in the preservation of resources in the waters of its own territorial sea. In *Bayside Fish* the State action was held to provide "a shield against covert depletion" of State fishery resources and to prevent evasion of State regulations. Landing laws also enhance conservation of local migratory fish which move freely between the territorial and extraterritorial waters (the high seas). Conservation of such mobile resources often requires application of State laws to the adjacent waters in the absence of applicable federal regulations. *See United States v. Alaska*, 422 U.S. 184 (1975).

In order for a landing law to be sustained, an actual State conservation interest in the resource must exist. In *Hjelle v. Brooks*, 377 F. Supp. 430 (D. Alaska 1974), a State law regulating high seas crab harvesting was set aside on the ground that it did not facilitate conservation of the crab resource within State waters. The court ruled that even if such State action would enhance enforcement of local conservation laws, in the absence of a factual conservation relationship between the State and extraterritorial crab resources, enforcement alone was in insufficient nexus to support a landing law.

(ii) Extraterritorial Jurisdiction Over State Citizens

In the absence of conflciting federal law, a State may directly regulate the fishing activity of its citizens beyond the territorial sea. International law allows nations to govern the conduct of their citizens upon the high seas or even in foreign countries provided the rights of those foreign

countries or their nationals are not infringed. As between the nation and its citizen, the only issue is the legitimacy of the law establishing the citizen's duty to his own government. *See United States v. Bowman*, 260 U.S. 94 (1922). In *Skiriotes v. Florida*, 313 U.S. 69 (1941), the United States Supreme Court recognized an analogous extraterritorial State jurisdiction over its citizens.

Appellate Skiriotes had been convicted of using sponge fishing equipment prohibited by State law. On appeal, he contested Florida's claim that his actions occurred within its territorial sea. The Court rejected the appellant's contention, holding that even if the locus of the offense was beyond Florida's boundary, the State's authority over its citizens is not limited by its borders. The Court noted:

> If the United States may control the conduct of its citizens upon the high seas, we see no reason why the State of Florida may not likewise govern the conduct of its citizens upon the high seas with respect to matters in which the State has a legitimate interest and where there is no conflict with acts of Congress.

Skiriotes, 313 U.S. at 77.

In *Skiriotes*, Florida's interest in the sponge fishery was assumed. While it might be argued that the citizenship-based Skiriotes standard is distinct from the conservation-based rationale for landing laws in *Bayside Fish*, because the State's extraterritorial jurisdiction was grounded on the relationship between the regulated citizen and his government and not upon the relationship between the State and the exploited resource; nonetheless, a federal appellate court has held that extraterritorial fishery jurisdiction over

citizens must also involve a resource in which the State has a legitimate interest and concerning which there is no conflicting federal law. *Felton v. Hodges*, 374 F.2d 337 (5th Cir. 1967). This holding comports with the facts present in *Skiriotes*.

(iii) Extraterritorial Jurisdiction Over Non-citizens

In *State v. Bundrant*, 546 P.2d 530 (Alaska), *appeal dismissed sub nom. Uri v. Alaska*, 429 U.S. 806 (1976), several non-Alaskan defendants urged a *Skiriotes*-based argument to limit the State's extraterritorial jurisdiction to Alaska citizens only. The Alaska Supreme Court rejected this argument, citing, *inter alia*, *Jacobson v. Maryland Racing Comm.*, 274 A.2d 102 (Md. 1971), and affirmed the defendants' convictions under a "proper and logical extension of the state's police power" over nonresidents fishing on the high seas. The defendants had been licensed by Alaska and had stipulated to facts held by the court to establish their "daily use of Alaskan territorial waters and facilities." *Bundrant* at n.106. Such contacts with the State together with conduct having a potentially detrimental impact upon local marine resources were held to trigger non-citizen liability to Alaska regulation even without the defendants' actual fishing in State territorial waters of their violation of landing laws.

2. Federal Fisheries Authority

(a) The Marine Rights of the United States

In *United States v. California*, 332 U.S. 19 (1947), the Supreme Court of the United States ruled that the Federal Government and not the States has full dominion over the resources of the territorial sea. The United States was held

to own these resources as a consequence of its constitutional powers over interstate and foreign commerce and its responsibility for conducting relations with foreign governments under its treatymaking and war authority. *See id.* at 35; *see also United States v. Louisiana*, 363 U.S. 1 (1960). Concurrent exercise of State police power was permissible only when such action did not interfere with federal rights, unduly burden interstate commerce or conflict with federal law. *E.g., Toomer v. Witsell*, 334 U.S. 385 (1948).

In the Submerged Lands Act of 1953 (SLA), 43 U.S.C. §§ 1301-1315, Congress conferred political and proprietary title to the lands and resources of the territorial sea upon the Coastal States. This transfer of title was not, however, absolute; the United States retained rights to regulate and control the lands and resources of the territorial sea for "the constitutional purposes of commerce, navigation, national defense, and international affairs," and explicitly affirmed that these federal rights are *paramount* to those of the States. 43 U.S.C. § 1314. Hence, even after the SLA, a State could only give effect to its regulations where such action did not unduly interfere with the operation of federal law and where the State's legitimate interests or citizens were involved. *E.g., Felton v. Hodges*, 374 F.2d 337 (5th Cir. 1967). For example, a landing law could not be enforced if its effect would have been a thwarting of paramount federal high seas fishing policy. *Cf. Hjelle v. Brooks*, 377 F. Supp. 430 (D. Alaska 1974).

(b) Federal Supersession of State Law, Generally

Supreme Court decisions have established the standards for determining the superseding effect of federal law. *E.g.*,

Jones v. Rath Packing, 430 U.S. 519 (1977). The first inquiry is whether Congress pursuant to an enumerated constitutional power has prohibited State regulation of the particular matter or activity. *Id.* at 525. When the regulatory field is one traditionally occupied by the States, the concurrent exercise of State power is assumed to be maintained unless the scheme of regulation is so pervasive "as to make reasonable the inference that Congress left no room for the States to supplement it," or when the Act touches a field so dominated by the federal interest that "the federal system will be assumed to preclude enforcement of State laws of the same subject." *Ray. v. Atlantic Richfield Co. (ARCO)*, 435 U.S. 151, 157 (1978). Likewise, supersession is to be assumed when the object sought to be obtained and the character of obligations imposed by it reveal a congressional purpose of exclusive federal regulation. *Id.*

The Supreme Court has repeatedly held that where Congress has exercised exclusive jurisdiction over a general and inclusive area of activity, the very delegation of regulatory power to an administrative agency will supersede any State action. *E.g., Ray v. ARCO, supra; Bethlehem Steel v. New York State Labor Relations Board*, 330 U.S. 767 (1947). At times, when Congress has passed such superseding legislation but effective implementation must wait upon promulgation of regulations, the Supreme Court has allowed the exercise of State police power "in the interval." *E.g., Ray v. ARCO*, 435 U.S. at 172. Nonetheless, once there are "comprehensive regulations effectively governing the subject matter of the statute," State action in that field is superseded "even though that particular phase

of the subject has not been taken up by the federal agency"; agency failure to exercise affirmatively its full authority takes on the character of a ruling that no such regulation is appropriate. *Bethlehem Steel*, 330 U.S. at 774.

Furthermore, as comprehensive federal regulation invalidates concurrent State action, it also nullifies looser or stricter State regulations when uniformity of regulation is necessary. *E.g., Ray v. ARCO, supra; Jones v. Rath Packing, supra; Huron Portland Cement v. Detroit*, 362 U.S. 440 (1960).

Federal acts that do not exclude all State legislation in the same field nevertheless supersede conflicting State laws. U.S. Const., art. VI, cl.2; *Rath Packing*, 430 U.S. at 525-526. A conflict will be found where compliance with both federal and State regulations is "a physical impossibility," or where the State law "stands as an obstacle to the accomplishment and execution of the full purpose and objective of Congress, not only as it is written but even as it is interpreted and applied. *Ray v. ARCO*, 435 U.S. at 157; 430 U.S. at 526.

(c) State and Federal Jurisdiction under the Magnuson Act

(1) The Nature of the Act

In the Magnuson Act Congress exercised its commerce power to prohibit foreign fishing within the boundaries of any State and to establish a comprehensive national regime for federal regulation of specified fisheries resources in the FCZ. This scheme was premised on the conclusion that a national program for fisheries conservation and management was needed, § 1801(a)(6), and would operate under

exclusive federal authority in and beyond the FCZ, §§ 1801(b)(1) and 1812, subject to the reservation of State authority specified within the Act itself, § 1856.

The Act provides for preparation of FMPs which must be consistent with articulated national standards, § 1851(a); FMPs are to be prepared, and the national standards applied, by Councils through whose operations "the States, the fishing industry, consumer and environmental organizations, and other interested persons [are enabled] to participate in, and advise on" the formulation and effect of such FMPs. § 1801(b)(5). The voting membership of a Council must include: the chief official responsible for fishery management within each constituent State; persons appointed by the Secretary upon recommendation by the governor of each constituent State; and the regional director of the National Marine Fisheries Service for the geographical area concerned. § 1852(b) While the Magnuson Act details the various measures, assessments and provisions required for inclusion in FMPs, the Councils and the Secretary may also include the fishery regulations of adjacent States where appropriate and consistent with the national standards. § 1853(b). Each FMP is to be reviewed, approved, implemented and enforced consistent with the national standards by the Secretary.

Congress intended that the national standards would be applied in the FCZ on a regional basis, having rejected a policy for allowing imposition of various and potentially conflicting State regulations because it "would be unnecessarily confusing." Magnuson Act Leg. Hist. at 846-847 (statement of Rep. Leggett). In particular, the Act's goal of applying national standards under a federally regu-

lated regional regime is so dominant a federal interest that the character of the obligations it imposes on the Councils and the Secretary manifest a clear congressional purpose to preclude such impediments. *See Ray v. ARCO*, 435 U.S. at 164. Hence, § 1856(a), sentence 2, prohibits both direct (*e.g.*, citizenship) and indirect (landing law) State regulation of fishing in the FCZ with one exception. *See* ¶ 2(c)(ii)(b), *infra*.

(ii) The Character of Supersession under the Magnuson Act

(a) § 1856(a), sentence 1.

The first sentence of § 1856(a) provides:

> Except as provided in subsection (b), nothing in this Act shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries.

This clause preserves for the Coastal States their traditional jurisdiction in the territorial sea, subject to the paramount rights of the Federal government under the United States Constitution. *E.g.*, the rights to regulate interest and foreign commerce reserved in the SLA § 1314. *Cf. First Iowa Hydro-Electric Coop v. FPC*, 328 U.S. 152 (1946). The prohibition of foreign fishing in the territorial sea is an exercise of these paramount rights. To domestic vessels, however, the clause limits the assertion of federal fisheries jurisdiction to the seas beyond the three-mile territorial waters. It does not, however, confer exclusive jurisdiction within the territorial sea upon any State. No State possessed such jurisdiction prior to the Magnuson Act, and § 1856(a) explicitly prohibits construction of its

provisions to extend State jurisdiction within its boundaries. Congress intended to retain for the States the political and proprietary rights conferred by the SLA subject to the reserved rights of the United States. *See* S. Rep. No. 94-416, 94th Cong., 1st Sess. *reprinted in* Magnuson Act Leg. Hist. at 659; *see also* Magnuson Act Leg. Hist. at 462 (statement of Sen. Magnuson).

A federal fishery statute silent as to its effect on State law could well supersede State laws regulating fishing in the territorial sea. The saving clause prevents this "natural course" supersession by limiting federal preemption of State regulation in the territorial sea to the procedure provided in § 1856(b). *See* ¶ 2(c)(ii)(c), *infra.*

(b) § 1856(a), sentence 2.

The second sentence of § 1856(a) provides:

> No State may directly or indirectly regulate any fishing which is engaged in by any fishing vessel outside its boundaries, unless such vessel is registered under the laws of such State.

This is a critical provision since it evidences the Congressional decision to assert federal jurisdiction in the FCZ without fully occupying the field and thereby preserves to the States the authority to regulate their own registered vessels. Of course, given the comprehensive nature of the Federal regime, if there were any actual conflict between federal and State regulations directly or indirectly affecting fishing in the FCZ, the federal regulations would prevail even as to State registered vessels. *Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1, 210 (1824), *Rath Packing, supra.* The Alaska Supreme Court, in *dicta,* has recently

acknowledged this result with respect to federal regulations promulgated under the Magnuson Act. *American Eagle, supra,* n.10.

Registration as used in § 1856(a) represents an alteration of prior law regarding the legitimate exercise of extraterritorial State jurisdiction under *Skiriotes, supra,* and *Bundrant, supra.* See ¶¶ (b)(i), (ii) and (iii). No longer may a State impose its fisheries laws in the absence of conflicting federal regulation in the FCZ based merely upon a showing of legitimate interests in the resources and the citizenship of the persons fishing or sufficient contacts between the State and noncitizens. The Magnuson Act now requires that the vessel whose fishing is to be subjected to State regulation must be "registered under the laws of such State."

(i) Registration

The actions constituting "registration" of a vessel, for the purposes of § 1856(a) are not stated within the Magnuson Act. However, courts in two Coastal States have held that licensing or other documentation of a vessel by a State will constitute such "registration." *People v. Weeren,* 26 Cal. 3d 654, 14 ERC 1250 (1980); *State v. Nelson,* No. C-2093 (Pacific County Super. Ct., Wash. Apr. 29, 1980) (*per curiam*).

In *Weeren,* the California Supreme Court noted that "registration" is a term of art under the federal documentation scheme applied only to ships engaged in international trade. Such vessels must be "licensed" if over five net tons, and both "licensed" and "enrolled" if weighing over twenty net tons. The "enrollment" denotes the national

character of the vessel, enabling it to obtain a license; the "license" limits the commercial use to which the vessel may be put. Possession of a federal license does not, however, supersede nondiscriminatory State regulation of a vessel's fishing activity. *Douglas v . Seacoast Products,* supra. Coastal States also issue other legal instruments to vessels in actions which constitute "a state license to use the boat for commercial fishing of a specified kind." *Weeren,* 26 Cal. 3d at , 14 ERC at 1255.

In the light of California's licensing procedure, the defendants' California citizenship, and the absence of federal regulation of the fishery involved in *Weeren,* the California Supreme Court held that § 1856(a) is intended to permit State regulation of fishing in the FCZ

> When not in conflict with federal law, when there exists a legitimate and demonstrable state interest served by the regulation, and when the fishing is from vessels which are [documentarily] regulated by it [*i.e.,* the State] and operated from ports under its authority.

Id., accord, Nelson, supra, American Eagle, supra.

(ii) The Scope of State Jurisdiction in the FCZ

The second sentence of § 1856(a) restricts the valid exercise of State police power over FCZ fishing to situations in which

(A) the State regulation is not inconsistent with any applicable federal fishery regulation: *i.e.,*

> (1) there are no federal regulations for the subject fishery; or

(2) compliance with both federal and State regulation is not impossible; or

(3) the State regulation does not impede the complete accomplishment of the goals of applicable federal regulations; and

(B) the vessel from which the fishing took place is "registered" under State law; and

(C) the State's legitimate interest in its territorial sea resources justifies the direct or indirect effect of its regulation of fishing in the FCZ; and

(D) the regulation neither discriminates against vessels from other States nor constitutes an undue burden on interstate commerce or any other federal right or authority.

(iii) Police Power in the Absence of Applicable Federal Regulation

The Magnuson Act is of the type of legislation requiring promulgation of regulations in order to effect its goals. *See* ¶2(b), *supra.* The California Supreme Court accurately noted that in the absence of federal regulations addressing the fishery involved in *Weeren, supra,*

> the exclusion of any such state regulation would create the danger of wholly unregulated exploitation of that species in coastal waters and on the high seas, thus resulting in the possibility of substantial or, indeed, total depletion of an important natural resource.

26 Cal. 3d at -...., 14 ERC at 1255. Such a result would be clearly inconsistent with congressional goals under the Act.

Hence, where they have a legitimate interest and prior to promulgation of applicable federal regulation for a particular fishery, States may regulate the fishing of vessels "registered" under its laws, directly, or indirectly according to the tenor of the State landing laws, provided there is no discrimination or undue burden on interstate commerce.

State regulation of fishing in the FCZ is limited to vessels "registered" in the same State. Regulations cannot be enforced against any persons who fish in the FCZ from a vessel not "registered" in the State seeking to regulate that vessel's activity. It is unlikely that a situation will arise in which a citizen of a State who fishes only in the FCZ from a vessel not "registered" in that State will operate from ports within that State or land therein. Nonetheless, should such a situation arise, the State's landing laws would not be enforceable against such a person, because such laws constitute indirect regulation of FCZ fishing prohibited by § 1856(a), second sentence. Corrective or preventive action regarding such a situation is available through incorporation of a State's landing laws or activity restrictions into the applicable FMP by the Council concerned or by amending the State's vessel registration laws to require such vessels to secure State "registration." In this regard, State citizenship plus use of State ports would seem to be a sufficient Constitutional nexus to support a registration requirement. *Cf. Weeren, supra.*

(iv) State Jurisdiction When Federal Regulations Have Been Promulgated

The *Weeren, Nelson* and *American Eagle* courts are in accord that promulgation of federal regulations regarding any fishery will supersede any *conflicting* State regulation of FCZ fishing. *E.g., Weeren*, 26 Cal. 3d at ...., 14 ERC at 1255; *American Eagle* at n.10. This supersession is automatic under the supremacy clause, U.S. Const., art VI, cl.2, and does not require the secretarial findings necessary under § 1856(b) for federal regulation within a State's territorial sea.

(c) §1856(b)

This section denotes the single exception to the first sentence of § 1856(a), and provides:

(1) If the Secretary finds, after notice and an opportunity for a hearing in accordance with section 554 of title 5, United States Code, that —

(A) the fishing in a fishery, which is covered by a fishery management plan under this Act, is engaged in predominantly within the fishery conservation zone and beyond such zone; and

(B) any State has taken any action, or omitted to take any action, the results of which will substantially and adversely affect the carrying out of such fishery management plan;

the Secretary shall promptly notify such State and the appropriate Council of such finding and of his intention to regulate the applicable fishery within the boundaries of such State (other than its internal waters), pursuant to such fishery management plan and the regulations promulgated to implement such plan.

(2) If the Secretary, pursuant to this subsection, assumes responsibility for the regulation of any fishery, the State involved may at any time thereafter apply to the Secretary for reinstatement of its authority over such fishery. If the Secretary finds that the reasons for which he assumed such regulation no longer prevail, he shall terminate such regulation.

While federal jurisdiction is exclusive in the FCZ as to non-registered vessels and supersedes any conflicting State regulation of registered vessels, the Coastal States retain concurrent jurisdiction within the territorial sea. SLA § 1314. The Magnuson Act § 1856(b) provides the Secretary with a remedy when he finds that a State's action or inaction has a substantial adverse effect on the accomplishment of an FMP covering a fishery predominately fished in and beyond the FCZ. Secretarial action under § 1856(b) provides for assertion of the paramount right of the United States reserved by SLA § 1314 to regulate the resources of the territorial sea. The Secretary may not regulate a territorial sea fishery if the resource is not predominately fished in the FCZ. Nor may federal regulation replace State police power in the territorial sea in the absence of a promulgated applicable FMP and a procedural finding of substantial and adverse effects upon the carrying out of the same FMP.

Congress intended to so limit preemption of the States' authority as retained by § 1856(a) "that such preemption will be the unusual, rather than the usual practice." H.R. Rep. No. 94-542, 94th Cong., 1st Sess., *reprinted in* Magnuson Act Leg. Hist. at 1126. Hence, a formal administra-

tive procedure is required in order for secretarial regulation of fishing in a State's territorial waters. Congressional concern to maintain the States' territorial rights is further indicated by granting the Secretary power merely to suspend State laws until the Secretary finds that the reasons for which federal authority was assumed in State waters "no longer prevail," and by allowing the concerned State to initiate the reinstatement inquiry.

The circumstances and procedure required by § 1856(b) only limit federal preemption of State authority in the territorial sea when such preemption is made pursuant to federal regulations promulgated under the Magnuson Act. Nothing in the Magnuson Act has amended the SLA § 1314 reservation of paramount federal rights in the territorial sea.

IMPLICATIONS:

The Magnuson Act and regulations promulgated thereunder can have profound effects on existing State fishery conservation and management efforts. These effects can be positive or negative, intended or unintended. Certain unavoidable effects may be ameliorated by changes in State law to conform more closely to federal regulations. Both the Councils and the State fishery agencies need to understand the basics of federal legal supremacy to ensure that federal fisheries regulations are not unduly disruptive or counterproductive of ongoing State management efforts.

With respect to federal supremacy, the Magnuson Act has both immediate and potential effects. Upon enactment, the Act superseded State authority to allow foreign fishing

and support vessels from conducting operations in the territorial sea and precluded foreign vessels from harvesting in any State's internal waters. Upon enactment, the Magnuson Act also imposed an additional registration requirement upon the exercise of direct or indirect State authority over fishing operations in the FCZ, and thus deprived the States of regulatory authority over vessels which either were not or could not be registered under State law. Changes may be necessary in some State laws to exercise fully the preserved State authority over all vessels that could be registered.

A Council's decision to prepare an FMP under the Magnuson Act carries with it a potential for interference with ongoing State management efforts. As indicated in the body of the text, a properly promulgated federal regulation will supersede conflicting State regulation—direct or indirect—of FCZ fishing. Moreover, divergence of federal regulations for the FCZ from those of adjacent States applicable to the territorial sea will complicate the compliance efforts of each jurisdiction by adding an additional element of proof to an enforcement action. For example, if a particular size of fish may be taken legally in the FCZ pursuant to federal regulations, but the same size fish is illegal if taken in the territorial sea, it will be necessary for the State to prove where the fish was taken to sustain a prosecution of its law. If the federal size limit were smaller than a State size limit, the federal enforcement officers would have to be able to prove that the fish was taken in the FCZ. If, on the other hand, the size limits were identical in both the FCZ and the territorial sea, the

compliance efforts of both the States and the federal government would be simplified.

For these reasons the Councils should be urged to proceed cautiously in developing FMPs which, when promulgated with federal regulations, may complicate ongoing State management efforts. Existing State laws should be examined closely first to determine if a federal FMP is even required, and second to determine which State laws should be incorporated within the FMP itself to avoid the inconsistency problem. To be sure, there will be some situations in which Councils will reject the approach taken by one or more adjacent States and will want to impose different regulations for the FCZ. In such situations uniformity between the FCZ and the territorial sea may be preserved by State action to conform the territorial sea management regime to that of the FMP. In extreme cases, where inconsistent State actions substantially and adversely affect the carrying out of an FMP for a fishery located predominantly in the FCZ, such uniformity can be obtained by Secretarial action pursuant to § 1856(b).

Appendix G

Presidential Proclamation 2667, September 28, 1945, with Respect to Natural Resources of the Subsoil and Sea Bed of the Continental Shelf

10 Federal Register 12303 (1945)

WHEREAS the Government of the United States of America, aware of the long range world-wide need for new sources of petroleum and other minerals, holds the view that efforts to discover and make available new supplies of these resources should be encouraged; and

WHEREAS its competent experts are of the opinion that such resources underlie many parts of the continental shelf off the coasts of the United States of America, and that with modern technological progress their utilization is already practicable or will become so at an early date; and

WHEREAS recognized jurisdiction over these resources is required in the interest of their conservation and prudent utilization when and as development is undertaken; and

WHEREAS it is the view of the Government of the United States that the exercise of jurisdiction over the natural resources of the subsoil and sea bed of the continental shelf by the contiguous nation is reasonable and just, since the effectiveness of measures to utilize or conserve these resources would be contingent upon cooperation and protection from the shore, since the continental shelf may be regarded as an extension of the land mass of the coastal nation and thus naturally appurtenant to it, since these resources frequently form a seaward extension of a pool or deposit lying within the territory, and since self-protec-

tion compels the coastal nation to keep close watch over activities off its shores which are of the nature necessary for utilization of these resources:

Now, Therefore, I, Harry S. Truman, President of the United States of America, do hereby proclaim the following policy of the United States of America with respect to the natural resources of the subsoil and sea bed of the continental shelf.

Having concern for the urgency of conserving and prudently utilizing its natural resources, the Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control. In cases where the continental shelf extends to the shores of another state, or is shared with an adjacent state, the boundary shall be determined by the United States and the state concerned in accordance with equitable principles. The character as high seas of the waters above the continental shelf and the right to their free and unimpeded navigation are in no way thus affected.

Appendix H

Presidential Proclamation 2668, September 28, 1945, With Respect to Coastal Fisheries in Certain Areas of the High Seas

10 Federal Register 12304 (1945)

WHEREAS for some years the Government of the United States of America has viewed with concern the inadequacy of present arrangements for the protection and perpetuation of the fishery resources contiguous to its coasts, and in view of the potentially disturbing effect of this situation, has carefully studied the possibility of improving the jurisdictional basis for conservation measures and international cooperation in this field; and

WHEREAS such fishery resources have a special importance to coastal communities as a source of livelihood and to the nation as a food and industrial resource; and

WHEREAS the progressive development of new methods and techniques contributes to intensified fishing over wide sea areas and in certain cases seriously threatens fisheries with depletion; and

WHEREAS there is an urgent need to protect coastal fishery resources from destructive exploitation, having due regard to conditions peculiar to each region and situation and to the special rights and equities of the coastal state and of any other state which may have established a legitimate interest therein;

NOW, THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, do hereby proclaim the follow-

ing policy of the United States of America with respect to coastal fisheries in certain areas of the high seas:

In view of the pressing need for conservation and protection of fishery resources, the Government of the United States regards it as proper to establish conservation zones in those areas of the high seas contiguous to the coasts of the United States wherein fishing activities have been or in the future may be developed and maintained on a substantial scale. Where such activities have been or shall hereafter be developed and maintained by its nationals alone, the United States regards it as proper to establish explicitly bounded conservation zones in which fishing activities shall be subject to the regulation and control of the United States. Where such activities have been or shall hereafter be legitimately developed and maintained jointly by nationals of the United States and nationals of other states, explicitly bounded conservation zones may be established under agreements between the United States and such other states; and all fishing activities in such zones shall be subject to regulation and control as provided in such agreements. The right of any state to establish conservation zones off its shores in accordance with the above principles is conceded, provided that corresponding recognition is given to any fishing interests of nationals of the United States which may exist in such areas. The character as high seas of the areas in which such conservation zones are established and the right to their free and unimpeded navigation are in no way thus affected.

Appendix I

University of Alaska
A Publication of the Alaska Sea Grant College Program
Volume 9, Number 3—June-September 1981

ALASKA Seas and Coasts
A Newsletter for the Alaska Commercial Fishing Industry

NEARSHORE MOVEMENT OF KING CRAB

by Stephen C. Jewett
Institute of Marin Science
University of Alaska
Fairbanks, Alaska

and

Guy C. Powell
Fisheries Biologist
Alaska Department of Fish and Game
Kodiak, Alaska

King crab have provided the foundation for the astonishingly rapid development of Alaska's high-seas fishing fleet. It is apparent from recent efforts to develop a large scale fishery for bottomfish that, due to the small unit value of bottomfish, these large high-seas vessels are going to be dependent, for at least part of the year, upon the valuable king crab resource to assure financial success.

With the movement for full development of Alaska's offshore petroleum resources, the shallow water behavior of the king crab for a portion of its life makes the species and

the fishery particularly vulnerable to any catastrophic mishaps. It has been demonstrated in the laboratory that 72-hour exposure of larval king crab to concentrations of water-soluble oil fractions as low as 0.8 or 0.9 parts per million permanently inhibited molting, and subsequently caused death.

In view of the king crab's commercial significance to the fishing industry, and its vulnerability to mishaps associated with oil development, Stephen Jewett of the U of A Institute of Marine Science and Guy Powell of the Alaska Department of Fish and Game have developed the following short article and pictorial selection to familiarize more people with the peculiar shallow-water behavior of the king crab. For the last 23 years Mr. Powell has made thousands of underwater observations of the behavior of king crab, and in 1977 Mr. Jewett joined him in that work.

King crab (Paralithodes camtschatica) migrate to shallow waters to release larvae, molt, mate, and spawn during March through June and then gradually migrate back to deeper water. Sexes of adult king crab are normally segregated, but from March through June the sexes are found together.

These shallow-water processes take place in the offshore environment, but to a lesser extent. Once in shallow water and prior to molting and mating each egg-bearing female releases 25,000 to 400,000 planktonic larvae into the water column. The larvae progress through five stages in approximately three months before they assume adult form on the ocean bottom.

After the larvae hatch, the females molt and mate. Molting and mating crab are observed in 15 to 90 feet of water in areas where kelp is common. Adult males molt prior to arriving on the mating ground and therefore arrive in the hard-shell condition. Females can mate only in the soft-shell condition immediately after molting. Adult females preparing to mate are believed to gain the attention of the males by emitting a chemical attractant before molting.

Male king crab grasp females at the base of both claws while facing them. This "precopulatory embrace" lasts anywhere from one to 16 days. After the female molts, the male crab releases the cast shell, reclasps her, and proceeds to spread spermatophore bands (sperm) around her gonopores (genital openings). The male then releases her and she begins to lay her eggs, depositing them beneath her "tail" (abdomen). She will hold and incubate the eggs until they hatch the next spring. Under experimental conditions males have been reported to mate with as many as 14 females.

When king crab are about one year old they emerge from rock crevices, kelp patches, and other protective niches where they have been living since settling from planktonic larvae a year before. No larger than a 25-cent piece, they wander slowly and aimlessly along the rocky bottom joining together with other crab their size. One small group joins another forming increasingly larger and larger groups. As these groups climb one upon another, characteristic ball-shaped pods are formed. Eventually the pods may grow to be 12 feet long and consist of thousands of individuals.

Podding in king crab is equivalent to herds, flocks, or schools in other animals and is believed to provide protection against predators. Pods are found year round and are made up of both males and females of similar size. They seem to disband either to feed or to change location.

Crab three years and older are too large for most fishes to feed on and probably do not form pods. Subadult and adult aggregations that have been observed are different from juvenile pods. Males sometimes form scattered circular piles two crab deep in the center. They do this as they migrate to shallower water to mate. In early spring, scattered aggregates of 2,000 to 6,000 premolt females are common. Adults will pile higher when an object such as a commercial king crab pot provides a wall which they can gather against.

The diet of king crab at various depths around Kodiak Island includes polychaete worms, clams, cockles, snails, barnacles, crabs, and sea stars. Approximately ten species of soft-shell clams are important prey to king crab in shallow water near Kodiak.

In early May 1978, large concentrations of king crab were located in Near Island Basin near the Kodiak city boat harbor. The crab were first sighted from a skiff just below the exposed low intertidal region. Some crab were actually exposed above water. Subsequent scuba diving revealed several hundred crab down to depths of 30 feet. All were intensely feeding on barnacles and clams, as well as sea urchins and sea stars.

On a dive made in June 1978 on the northern end of Kodiak, in Anton Larsen Bay, we encountered king crab intensely feeding on barnacles. The dive began on a steep

slope at 60 feet. While ascending up the slope toward shore, it was apparent that barnacles had recently been removed from the rocky substrate. King crab were subsequently observed at 27 feet continuing to move up the slope removing barnacles.

It is postulated that abundant food resources are necessary to replenish the recently expended energy of molting and mating activities and that soft-shell clams and barnacles of the Kodiak coastal region serve as an excellent source.

Adult king crab have been observed to eat the large sunflower sea star *Pycnopodia helianthoides*. This sea star is often as large or larger than the king crab which feeds upon it. Many *Pycnopodia* observed by scuba divers were tightly squeezed into rock crevices when king crab were in the vicinity. This behavior is assumed to be an avoidance response.

Species like the king crab which disperse larvae and feed in shallow, nearshore regions are especially vulnerable to petroleum contamination. Molting was permanently inhibited by exposing the larvae for 72 hours to oil at a concentration of 0.8 and 0.9 parts per million in the laboratory. Although high concentrations of oil killed the larvae in 96 hours, lower concentrations disrupted swimming and molting in the same period and also ultimately resulted in death.

In view of the king crab's commercial significance and the importance of Kodiak Island's nearshore environment to this crab, special attention should be focussed on the increased petroleum exploration and development that might be disruptive to the existence of king crab.

THE KING CRAB IN ALASKA

Alaska Department of Fish and Game
Wildlife Notebook Series

KING CRABS (*Paralithodes camtschatica*) are the objects of intense fisheries in the northern Pacific Ocean and Bering Sea by the United States, Japan and the Soviet Union.

King crabs are not true crabs, such as the Dungeness crab of the Pacific Coast, but are more closely related to hermit crabs. However, biologically they are more sophisticated than hermit crabs. Fleshy abdomens of king crabs are compressed under their bodies and are covered by a series of protective plates. The abdomen of the female is fan-shaped and functions as a brood chamber for fertilized eggs.

The legs of king crabs are jointed to fold behind the body instead of being jointed forward as are the legs of true crabs. The legs and carapace are spiney, which provides protection from predaceous fishes.

King crabs may grow as large as 24 pound in 15 years but commercially caught males average about seven pounds and are 8 or 9 years old. Crabs of this size measure about three feet with legs extended.

LIFE HISTORY: Female king crabs carry an average of 240,000 fertilized eggs in their brood pouches for nearly a year before they hatch. The freed larvae are planktonic for 40-60 days and drift with the tides and prevailing ocean currents. Larvae settle to the ocean bottom after their fourth molt when they develop a calcareous

exoskeleton. At this stage of their life, they lose their ability to swim or leave the ocean bottom. Immature crabs form "pods" by piling on each other in a form of defensive behavior. Individual pods may consist of as many as several thousand crabs.

King crabs reach maturity at 4 and 5 years of age and about four inches in length and width of shell. Females molt annually following maturity. Molting occurs in the presence of a male and mating immediately follows. Eggs are extruded into the brood pouch where embryonic development occurs.

Young adult males generally molt annually but frequency of molt decreases with age until it appears that molting occurs on alternate years for individual crabs.

King crabs display an annual migration pattern. In late winter they move from the outer continental shelf to water depths of less than 40 fathoms where females molt and are mated. These grounds may be along shore or on submerged offshore banks. Crabs move to deeper water following mating and feed throughout the summer, fall and early winter months.

Distribution: King crabs are located in the eastern Bering Sea and along the entire Pacific coast of Alaska including the Aleutian Islands. Major Alaskan fisheries for these crabs are centered at lower Cook Inlet, Kodiak Island, Unimak Pass area, Adak and Atka and the eastern Bering Sea north of the Alaska Peninsula. Minor fisheries exist in Southeastern Alaska and among the Shumagin Islands.

Commercial Fishery: Crabs are caught with baited pots which are six or seven feet square, three feet high and weigh 500 to 700 pounds each. Vessels may fish 50 to 100 such pots. Pots are baited with chopped herring which is usually replaced every two or three days.

Crab vessels vary greatly in size. Boats 40 feet in length may fish in bays adjacent to processing plants while vessels from 75 to 175 feet long fish open ocean grounds.

The Alaska king crab fishery was pioneered in the early 1950s. Annual catches have varied quite dramatically. A peak catch of 159 million pounds was obtained in 1966. This may be about twice the annual yield to be expected over the long run.

King crabs are generally processed by cooking for 20 minutes in boiling water and cooling quickly in salt water. Crab legs may also be partially cooked, then split and broiled for a gourmet's delight.

John C. McMullen
Reprinted 1978

Appendix J

Memorandum
State of Alaska

To: John Gissberg
Assistant Attorney General
Attorney Generals Office
Anchorage

From: Sgt. Robert Brown
Community Relations
Fish & Wildlife Protection
Anchorage

Date: July 22, 1981

File No.

Telephone No.

Subject: Vessel Seizure

Since January 1976, our records indicate that five king crab vessels have been seized as a result of violating Alaska's commercial fishing regulations. During this same period of time, the actual number of king crab permits being fished were 3,685, as indicated by the Limited Entry Commission.

Appendix K

Law Offices of
Faulkner, Banfield, Doogan & Holmes
Suite 201, 311 Franklin Street
Juneau, Alaska 99801

April 9, 1976

Gerald W. Markham
Assistant Attorney General
Department of Law
360 "K" Street, Suite 105
Anchorage, Alaska 99501

Re: American Eagle

Dear Jerry:

I talked with Doug Fryer about the American Eagle. As you know, he is trying to meet with crew members now that we have received the materials you sent us.

We expect to be filing an answer during the next few weeks. As you know, I will be out of the state for most of the time during the next month.

Very truly yours,

/s/
William B. Rozell

WBR:js

cc: Douglas M. Fryer, Esq.

Appendix L

October 26, 1976

William B. Rozell, Esq.
Faulkner, Banfield, Doogan & Holmes
311 Franklin St., Suite 201
Juneau, Alaska 99811

Re: *State v. F/V American Eagle*

Dear Mr. Rozell:

As you know Jerry Markham has begun a private law practice in Kodiak. However the State has retained him to continue his participation in the captioned case and I will be working with him as we prepare for trial.

I have sent Mr. Fryer the mortgage of vessel to be recorded in Seattle by the custom house brokers. This appears to be one of the last procedural matters relating to the bond in this file. However, our records still do not reflect the current hull insurance policy and I would appreciate a copy of that document.

In order to confirm your prior receipt of evidence now available to us I am enclosing copies of all our file materials relating to the State's evidence. This includes statements by eye witnesses as well as certain statistical analyses.

We would like to move that this trial be set for the week of March 7, 1977; this advance warning should allow our witnesses to arrange their plans so as to be available for the hearing. If this is satisfactory to you, I would appre-

ciate your confirmation so that I may contact the calendar clerk.

Thank you very much for your cooperation.

Very truly yours,
AVRUM M. GROSS
ATTORNEY GENERAL

/s/ JOHN G. GISSBERG
Assistant Attorney General

Appendix M

[Letterhead]

Law Offices
Moriarty, Long, Mikkelborg & Broz
3300 Seattle-First National Bank Building
Seattle, Washington 98154
(206) 623-5890

November 10, 1976

John G. Gissberg
Asst. Attorney General
State of Alaska
360 K Street, Suite 105
Anchorage, AK 99501

Re: State v. F/V AMERICAN EAGLE

Dear Mr. Gissberg:

This will confirm our telephone conversation in which we agreed that the above-captioned matter may be tried on March 28, 1977. We further explored the possibility of a change of venue, but have made no agreement in that regard and it will be our responsibility to file an appropriate motion.

Very truly yours,

/s/ DOUGLAS M. FRYER
Douglas M. Fryer

Appendix N

In the Trial Courts for the State of Alaska
Third Judicial District
Kodiak, Alaska

STATE OF ALASKA,
Plaintiff

vs

THE F/V AMERICAN EAGLE, etc.,
Defendant

Case No. 76-16023

Calendaring Order

This Case Is:

Assigned to Judge Roy H. Madsen in Kodiak, Alaska

Ordered for trial on Tuesday, March 29, 1977, at 9:00 A.M.
[XXX] Jury [ ] Non Jury IN KODIAK

[ ] Pre-Trial Conference .....

.....

[ ] Other .....

.....

Dated this 17th day of November, 1976.

By Order of a Superior Court
Judge

/s/ ROY H. MADSEN

Roy H. Madsen

I certify that on 11/17/76
a copy of the above was mailed
to each of the above counsel
and/or individual at their
addresses of record.

C. Glynn

Calendar Clerk

Appendix O

[Letterhead]

North Pacific Fishery Management Council
Mailing Address: P.O. Box 3136DT
Anchorage, Alaska 99510
Telephone: (907) 274-4563
FTS 265-5435

To Whom it May Concern:

I am the Executive Director of the North Pacific Fishery Management Council. Part of my responsibilities include maintaining records for the Council in the Anchorage office.

The attached document captioned "King Crab Motion #1" is filed in our records and was adopted by the Council at the May 1981 meeting.

Dated this 17th day of July 1981 at Anchorage, Alaska.

/s/ JIM H. BRANSON

Jim H. Branson
Executive Director

Signature notarized before me:
July 17, 1981

/s/ JUDY WILLOUGHBY

Judy Willoughby
My commission expires Sept. 25, 1983

KING CRAB MOTION #1

I move:

(1) that the Council adopt the Joint Statement of Principles on the Management of Domestic King Crab Fisheries from the Bering Sea and Aleutians by the Alaska Board of Fisheries as revised March 26, 1981;

(2) that the Council approve the Alaska Board of Fisheries Bering Sea/Aleutian Island King Crab Fishery Management Framework, dated April 1, 1981;

(3) that the Council find, on the basis of the commitment of the Alaska Board of Fisheries to adhere to the Statement of Principles and Framework mentioned above, that the 1981 king crab fishery in the Bering Sea and Aleutian Islands area does not require conservation and management other than that provided by the State of Alaska.

During this period of time the State will continue management and enforcement of the king crab fishery.

Appendix P

Constitutional Provisions, Statutes, Rules and Regulations

Constitutional Provisions

Constitution of the State of Alaska, Article VIII, Section 2

ARTICLE VIII

NATURAL RESOURCES

SECTION 2. The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people.

Constitution of the State of Alaska, Article VIII, Section 4

SECTION 4. Fish, forests, wildlife, grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses.

Federal Statutes

Fishery Conservation and Management Act of 1976 (16 U.S.C. § 1801-82)

§ 1801. Findings, purposes and policy

(a) Findings.—The Congress finds and declares the following:

(1) The fish off the coasts of the United States, the highly migratory species of the high seas, the species which dwell on or in the Continental Shelf appertaining to the United States, and the anadromous species which spawn

in United States rivers or estuaries, constitute valuable and renewable natural resources. These fishery resources contribute to the food supply, economy, and health of the Nation and provide recreational opportunities.

(2) As a consequence of increased fishing pressure and because of the inadequacy of fishery conservation and management practices and controls (A) certain stocks of such fish have been overfished to the point where their survival is threatened, and (B) other such stocks have been so substantially reduced in number that they could become similarly threatened.

(3) Commercial and recreational fishing constitutes a major source of employment and contributes significantly to the economy of the Nation. Many coastal areas are dependent upon fishing and related activities, and their economies have been badly damaged by the overfishing of fishery resources at an ever-increasing rate over the past decade. The activities of massive foreign fishing fleets in waters adjacent to such coastal areas have contributed to such damage, interfered with domestic fishing efforts, and caused destruction of the fishing gear of United States fishermen.

(4) International fishery agreements have not been effective in preventing or terminating the overfishing of these valuable fishery resources. There is danger that irreversible effects from overfishing will take place before an effective international agreement on fishing management jurisdiction can be negotiated, signed, ratified, and implemented.

(5) Fishery resources are finite but renewable. If placed under sound management before overfishing has caused irreversible effects, the fisheries can be conserved and maintained so as to provide optimum yields on a continuing basis.

(6) A national program for the conservation and management of the fishery resources of the United States is necessary to prevent overfishing, to rebuild overfished stocks, to insure conservation, and to realize the full potential of the Nation's fishery resources.

(7) A national program for the development of fisheries which are underutilized or not utilized by the United States fishing industry, including bottom fish off Alaska, is necessary to assure that our citizens benefit from the employment, food supply, and revenue which could be generated thereby.

(b) Purposes.—It is therefore declared to be the purposes of the Congress in this chapter—

(1) to take immediate action to conserve and manage the fishery resources found off the coasts of the United States, and the anadromous species and Continental Shelf fishery resources of the United States, by establishing (A) a fishery conservation zone within which the United States will assume exclusive fishery management authority over all fish, except highly migratory species, and (B) exclusive fishery management authority beyond such zone over such anadromous species and Continental Shelf fishery resources;

(2) to support and encourage the implementation and enforcement of international fishery agreements for the conservation and management of highly migratory species, and to encourage the negotiation and implementation of additional such agreements as necessary;

(3) to promote domestic commercial and recreational fishing under sound conservation and management principles;

(4) to provide for the preparation and implementation, in accordance with national standards, of fishery management plans which will achieve and maintain, on a continuing basis, the optimum yield from each fishery;

(5) to establish Regional Fishery Management Councils to prepare, monitor, and revise such plans under circumstances (A) which will enable the States, the fishing industry, consumer and environmental organizations, and other interested persons to participate in, and advise on, the establishment and administration of such plans, and (B) which take into account the social and economic needs of the States; and

(6) to encourage the development by the United States fishing industry of fisheries which are currently underutilized or not utilized by United States fishermen, including bottom fish off Alaska.

(c) Policy.—It is further declared to be the policy of the Congress in this chapter—

(1) to maintain without change the existing territorial or other ocean jurisdiction of the United States for all

purposes other than the conservation and management of fishery resources, as provided for in this chapter;

(2) to authorize no impediment to, or interference with, recognized legitimate uses of the high seas, except as necessary for the conservation and management of fishery resources, as provided for in this chapter;

(3) to assure that the national fishery conservation and management program utilizes, and is based upon, the best scientific information available; involves, and is responsive to the needs of, interested and affected States and citizens; promotes efficiency; draws upon Federal, State, and academic capabilities in carrying out research, administration, management, and enforcement; and is workable and effective;

(4) to permit foreign fishing consistent with the provisions of this chapter; and

(5) to support and encourage continued active United States efforts to obtain an internationally acceptable treaty, at the Third United Nations Conference on the Law of the Sea, which provides for effective conservation and management of fishery resources.

16 U.S.C. § 1856. State Jurisdiction

(a) In general.—Except as provided in subsection (b) of this section, nothing in this chapter shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries. No State may directly or indirectly regulate any fishing which is engaged in by any fishing vessel outside its boundaries, unless such vessel is registered under the laws of such State.

(b) Exception.—(1) If the Secretary finds, after notice and an opportunity for a hearing in accordance with section 554 of Title 5, that—

(A) the fishing in a fishery, which is covered by a fishery management plan implemented under this chapter, is engaged in predominately within the fishery conservation zone and beyond such zone; and

(B) any State has taken any action, or omitted to take any action, the results of which will substantially and adversely affect the carrying out of such fishery management plan;

the Secretary shall promptly notify such State and the appropriate Council of such finding and of his intention to regulate the applicable fishery within the boundaries of such State (other than its internal waters), pursuant to such fishery management plan and the regulations promulgated to implement such plan.

(2) If the Secretary, pursuant to this subsection, assumes responsibility for the regulation of any fishery, the State involved may at any time thereafter apply to the Secretary for reinstatement of its authority over such fishery. If the Secretary finds that the reasons for which he assumed such regulation no longer prevail, he shall promptly terminate such regulation.

43 U.S.C. § 1302. Resources seaward of the Continental Shelf

Nothing in this chapter shall be deemed to affect in any wise the rights of the United States to the natural resources of that portion of the subsoil and seabed of the

Continental Shelf lying seaward and outside of the area of lands beneath navigable waters, as defined in section 1301 of this title, all of which natural resources appertain to the United States, and the jurisdiction and control of which by the United States is confirmed.

43 U.S.C. § 1331. Definitions

When used in this subchapter—

(a) The term "outer Continental Shelf" means all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in section 1301 of this title, and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control;

(b) The term "Secretary" means the Secretary of the Interior;

(c) The term "mineral lease" means any form of authorization for the exploration for, or development or removal of deposits of, oil, gas, or other minerals; and

(d) The term "person" includes, in addition to a natural person, an association, a State, a political subdivision of a State, or a private, public, or municipal corporation.

43 U.S.C. § 1332. Congressional declaration of policy; jurisdiction; construction

(a) It is declared to be the policy of the United States that the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this subchapter.

(b) This subchapter shall be construed in such manner that the character as high seas of the waters above the outer Continental Shelf and the right to navigation and fishing therein shall not be affected.

43 U.S.C. § 1333. Laws and regulations governing lands—Constitution and United States laws; laws of adjacent States; publication of projected States lines; restriction on State taxation and jurisdiction

(a) (1) The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands and fixed structures which may be erected thereon for the purpose of exploring for, developing, removing, and transporting resources therefrom, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State: *Provided, however*, That mineral leases on the outer Continental Shelf shall be maintained or issued only under the provisions of this subchapter.

(2) To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State as of August 7, 1953 are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Reg-

ister such projected lines extending seaward and defining each such area. All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States. State taxation laws shall not apply to the outer Continental Shelf.

(3) The provisions of this section for adoption of State law as the law of the United States shall never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose over the seabed and subsoil of the outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom.

Jurisdiction of United States district courts

(b) The United States district courts shall have original jurisdiction of cases and controversies arising out of or in connection with any operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing or transporting by pipeline the natural resources, or involving rights to the natural resources of the subsoil and seabed of the outer Continental Shelf, and proceedings with respect to any such case or controversy may be instituted in the judicial district in which any defendant resides or may be found, or in the judicial district of the adjacent State nearest the place where the cause of action arose.

Applicibility of Longshoremen's and Harbor Workers' Compensation Act; definitions

(c) With respect to disability or death of an employee resulting from any injury occurring as the result of opera-

tions described in subsection (b) of this section, compensation shall be payable under the provisions of the Longshoremen's and Harbor Workers' Compensation Act. For the purposes of the extension of the provisions of the Longshoremen's and Harbor Workers' Compensation Act under this section—

(1) the term "employee" does not include a master or member of a crew of any vessel, or an officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof;

(2) the term "employer" means an employer any of whose employees are employed in such operations; and

(3) the term "United States" when used in a geographical sense includes the outer Continental Shelf and artificial islands and fixed structures thereon.

Applicability of National Labor Relations Act

(d) For the purposes of the National Labor Relations Act, as amended, any unfair labor practice, as defined in such Act, occurring upon any artificial island or fixed structure referred to in subsection (a) of this section shall be deemed to have occurred within the judicial district of the adjacent State nearest the place of location of such island structure.

Coast Guard regulations; marking of islands and structures; offenses and penalties

(e) (1) The head of the Department in which the Coast Guard is operating shall have authority to promulgate and enforce such reasonable regulations with respect to lights

and other warning devices, safety equipment, and other matters relating to the promotion of safety of life and property on the islands and structures referred to in subsection (a) of this section or on the waters adjacent thereto, as he may deem necessary.

(2) The head of the Department in which the Coast Guard is operating may mark for the protection of navigation any such island or structure whenever the owner has failed suitably to mark the same in accordance with regulations issued hereunder, and the owner shall pay the cost thereof. Any person, firm, company, or corporation who shall fail or refuse to obey any of the lawful rules and regulations issued hereunder shall be guilty of a misdemeanor and shall be fined not more than $100 for each offense. Each day during which such violation shall continue shall be considered a new offense.

Prevention of obstruction to navigation by Secretary of the Army

(f) The authority of the Secretary of the Army to prevent obstruction to navigation in the navigable waters of the United States is extended to artificial islands and fixed structures located on the outer Continental Shelf.

Provisions as non-exclusive

(g) The specific application by this section of certain provisions of law to the subsoil and seabed of the outer Continental Shelf and the artificial islands and fixed structures referred to in subsection (a) of this section or to acts or offenses occurring or committed thereon shall not give rise to any inference that the application to such islands

and structures, acts, or offenses of any other provision of law is not intended.

State Statutes

A.S. 16.05.060

Emergency Openings and Closures

This chapter does not limit the power of the commissioner or his authorized designee, when circumstances require, to summarily open or close seasons or areas or to change weekly closed periods on fish or game by means of emergency orders. An emergency order has the force and effect of law after field announcement by the commissioner or his authorized designee. An emergency order adopted under this section is not subject to the Administrative Procedure Act.

A.S. 16.05.190

Seizure without warrant and confiscation by court

Guns, traps, nets, fishing tackle, boats, aircraft, automobiles or other vehicles, sleds, and other paraphernalia used in or in aid of a violation of this chapter, or rule or regulation of the department may be seized under a valid search, and all fish and game, or parts of fish and game, or nests or eggs of birds, taken, transported, or possessed contrary to the provisions of this chapter, or rule or regulation of the department may be seized under a valid search, and all fish and game, or parts of fish and game, or nests or eggs of birds, taken, transported, or possessed contrary to the provisions of this chapter, or rule or regulation of the department shall be seized by any person designated in § 150 of this chapter. Upon conviction

of the offender or upon judgment of the court having jurisdiction that the item was taken, transported, or possessed in violation of this chapter or rule or regulation of the department, all fish and game, or parts of them are forfeited to the state and shall be disposed of as directed by the court. If sold, the proceeds of the sale shall be transmitted to the proper state officer for deposit in the general fund. Guns, traps, nets, fishing tackle, boats, aircraft, or other vehicles, sleds, and other paraphernalia seized under the provisions of this chapter, or rule or regulation of the department, unless forfeited by order of the court, shall be returned, after completion of the case and payment of the fine, if any.

A.S. 16.05.195

Forfeiture of equipment

(a) Guns, traps, nets, fishing gear, vessels, aircraft, other motor vehicles, sleds, and other paraphernalia or gear used in or in aid of a violation of this title, or regulation promulgated under this title, and all fish and game or parts of fish and game or nests or eggs of birds taken, transported or possessed contrary to the provisions of this title, or regulation promulgated under it, may be forfeited to the state

(1) upon conviction of the offender in a criminal proceeding of a violation of this title in a court of competent jurisdiction; or

(2) upon judgment of a court of competent jurisdiction in a proceeding in rem that an item specified above was

used in or in aid of a violation of this title or a regulation promulgated under it.

(b) Items specified in (a) of this section may be forfeited under this section regardless of whether they were seized before instituting the forfeiture action.

(c) An action for forfeiture under this section may be joined with an alternative action for damages brought by the state to recover damages for the value of fish and game or parts of them or nests or eggs of birds taken, transported or possessed contrary to the provisions of this title or a regulation promulgated under it.

(d) It is no defense that the person who had the item specified in (a) of this section in possession at the time of its use and seizure has not been convicted or acquitted in a criminal proceeding resulting from or arising out of its use.

(e) No forfeiture may be made of an item subsequently sold to an innocent purchaser in good faith. The burden of proof as to whether the purchaser purchased the item innocently and in good faith shall be on the purchaser.

(f) An item forfeited under this section shall be disposed of at the discretion of the department.

A.S. 16.05.221

Boards of Fisheries and Game. (a) For purposes of the conservation and development of the fishery resources of the state, there is created the Board of Fisheries composed of seven members appointed by the governor, subject to confirmation by a majority of the members of the

legislature in joint session. The appointed members shall be residents of the state and shall be appointed without regard to political affiliation or geographical location of residence. The commissioner is not a member of the Board of Fisheries, but shall be ex officio secretary.

(b) For purposes of the conservation and development of the game resources of the state, there is created a Board of Game composed of seven members appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session. The appointed members shall be residents of the state, and shall be appointed without regard to political affiliation or geographical location of residence. The commissioner is not a member of the Board of Game, but shall be ex officio secretary.

A.S. 16.05.920

Certain acts made unlawful. (a) Unless permitted by this chapter or by regulation made under this chapter, it is unlawful for a person to take, possess, transport, sell, offer to sell, purchase, or offer to purchase fish, game, or marine aquatic plants, or any part of fish, game or aquatic plants, or a nest or egg of fish or game.

(b) No person may knowingly disturb, injure, or destroy a notice, signboard, seal, tag, aircraft, boat, vessel, automobile, paraphernalia, equipment, building or other improvement or property of the department used in the administration or enforcement of this chapter, or a poster or notice to the public concerning the provisions of this chapter, or regulation adopted under this chapter, or a

marker indicating the boundary of an area closed to hunting, trapping, fishing or other special use under this chapter. No person may knowingly destroy, remove, tamper with, or imitate a seal or tag issued or used by the department or attached under its authority to a skin, portion, or specimen of fish or game, or other article for the purpose of identification or authentication in accordance with this chapter or a regulation adopted under this chapter.

State Regulations

5 AAC 34.005

Statistical Areas Established

(a) For the king crab fishery, there are established the following statistical areas with the following code letters:

Code Letter

A—Southeastern Alaska—Yakutat Area, comprised of the waters specified in sec. 100 of this chapter.

E—Prince William Sound Area, Comprised of the waters specified in sec. 200 of this chapter.

H—Cook Inlet Area, comprised of the waters specified in sec. 300 of this chapter.

K—Kodiak Area, comprised of the waters specified in sec. 400 of this chapter.

M—Alaska Peninsula Area, comprised of the waters specified in sec. 500 of this chapter.

O—Dutch Harbor Area, comprised of the waters specified in sec. 600 of this chapter.

R—Adak Area, comprised of the waters specified in sec. 700 of this chapter.

S—Western Aleutians Area, comprised of the waters specified in sec. 800 of this chapter.

Q—Bering Sea Area, comprised of the waters specified in sec. 900 of this chapter.

(b) Each statistical area consists of:

(1) a registration area, comprised of all waters within the statistical area which are waters subject to the jurisdiction of the state; and

(2) an adjacent seaward biological influence zone, comprised of all waters within the statistical area which are not part of the registration area.

(c) Registration areas are areas in which the department shall apply conservation and management regulations in order to protect and maintain the king crab resources of the state.

(d) Adjacent seaward biological influence zones are areas which the department shall utilize to obtain biological and fishing effort data and other information necessary for the formulation of comprehensive and effective conservation and management regulations governing king crab resources inhabiting waters subject to the jurisdiction of the state.

Authority: A.S. 16.05.250

5 AAC 34.035

Closure of Registration Areas

(a) The commissioner shall monitor the condition of king crab stocks in all statistical areas through the use of such data and information as are practically available.

(b) When the commissioner finds that continued fishing effort would jeopardize the viability of king crab within a registration area, he shall close the registration area by emergency order.

(c) In determining whether to close a registration area, the commissioner shall consider all appropriate factors to the extent there is information available on such factors. Factors which may be considered include:

(1) the effect of overall fishing effort within the statistical area encompassing the registration area.

(2) catch per unit of effort and rate of harvest;

(3) relative abundance of king crab within the area in comparison with preseason expectations of the department;

(4) such guideline harvest levels as may be promulgated by regulation;

(5) the proportion of immature of softshell king crab being handled;

(6) general information on the condition of king crab within the area; and

(7) information pertaining to the maximum sustainable yield level of king crab within the registration area.

(d) Within five days after the closure of any registration area, the owner of any vessel registered for that area may formally request the commissioner to reopen the area. The commissioner shall personally review pertinent information on the condition of king crab within the area, and shall formally announce his decision within 14 days of the receipt of the request.

(e) After 72 hours following the closure of any registration area, no vessel registered for that area may have king crab on board in waters subject to the jurisdiction of the state unless;

(1) the vessel is validly registered for another registration area and the season is open in the area; and

(2) the vessel is otherwise in compliance with secs. 020 and 030 of this chapter.

Authority: A.S. 16.05.060

A.S. 16.05.250(2), (3), (4), (7), (10)

5 AAC 34.600

Description Of Statistical Area

Statistical area O has as its eastern boundary the longitude of Scotch Cap light, and as its western boundary 172 degrees W. long., and its seaward boundaries the 800 fathom depth contour, excluding the waters of statistical area Q.

Authority: A.S. 16.05.250(2)

5 AAC 34.605

Description of Districts

(a) Akun district: all waters of statistical area O east of a line beginning at 54 degrees 36 minutes N. lat. (the northern boundary of king crab registration area O), 165 degrees 31 minutes 30 seconds W. long., to Billings Head light at 54 degrees 18 minutes N. lat., 165 degrees 31 minutes 30 seconds W. long., then to Jackass Point at 54 degrees 06 minutes 35 seconds N. lat., 165 degrees 34 minutes W. long., then to Avatanak Point at 54 degrees 04 minutes 30 seconds N. lat., 165 degrees 17 minutes W. long., and east of 165 degrees 17 minutes W. long.;

(b) Akutan district: all Bering Sea waters of statistical area O west of the longitude of Billings Head light (165 degrees 31 minutes 30 seconds W. long.), east of the longitude of Koriga Point on Unalaska Island (166 degrees 59 minutes 50 seconds W. long.), and north of a line from Erkine Point on Unalaska Island to Jackass Point on Akun Island;

(c) Egg Island district: all Pacific Ocean waters of statistical area O east of the longitude of Udagak Strait on Unalaska Island (166 degrees 15 minutes W. long.), south of a line from Erskine Point on Unalaska Island (53 degrees 59 minutes N. lat., 166 degrees 16 minutes 45 seconds W. long.) to Jackass Point on Akun Island (54 degrees 06 minutes 35 seconds N. lat., 165 degrees 34 minutes W. long.) then to Avatanak Point (54 degrees 02 minutes 30 seconds N. lat., 165 degrees 17 minutes W. long.), and west of the longitude of Avatanak Point (165 degrees 17

minutes W. long.) including the waters of Beaver Inlet and Udagak Strait;

(d) Unalaska district: all Bering Sea waters of statistical area O west of the longitude of Koriga Point on Unalaska Island (166 degrees 59 minutes 50 seconds W. long.), east of Cape Tanak on Umnak Island (168 degrees W. long.), and north of a line from Kettle Cape on Umnak Island (53 degrees 16 minutes 40 seconds N. lat., 168 degrees 07 minutes W. long.), to Konets Head on Unalaska Island (53 degrees 19 minutes N. lat., 176 degrees 51 minutes W. long.);

(e) Western district: all Bering Sea waters of statistical area O west of the longitude of Cape Tanak on Unalaska Island and all Pacific Ocean waters of king crab registration area O west of the longitude of Udagak Strait (166 degrees 16 minutes W. long.), and south of a line from Kettle Cape on Umnak Island (53 degrees 16 minutes 40 seconds N. lat., 168 degrees 07 minutes W. long.) to Konets Head (53 degrees 19 minutes N. lat., 167 degrees 51 minutes W. long.) on Unalaska Island, excluding the waters of Udagak Strait and Beaver Inlet.

Authority: A.S. 16.05.250(2)

5 AAC 34.610

Fishing Seasons

King crab may be taken or possessed from 12:00 noon November 1 through February 15 unless the registration area is closed earlier by emergency order.

Authority: A.S. 16.05.060
A.S. 16.05.250(2).

5 AAC 36.040

Transportation And Possession of Shrimp, Scallops And King, Dungeness Or Tanner Crabs.

It is unlawful to possess, sell, offer to sell, barter, offer to barter, give or transport, purchase or offer to purchase within the state, including the waters of the state any shrimp, scallops and king, dungeness, or tanner crab taken contrary to or in violation of the rules and regulations promulgated by the board, if said shrimp, scallops or crabs are taken in any waters seaward of that officially designated as the territorial waters of Alaska to a depth of 200 meters, or beyond that limit, to where the depth of the superjacent waters admits of the exploitation of these shrimp, scallops or crabs and for the Kodiak and Cook Inlet areas if said shrimp, scallops or crabs are taken in the following waters:

(1) in the Kodiak area, an area bounded by a line beginning at the southern entrance of Imuya Bay near Kilokak Rocks to a point southwest of Chirikof Island at 55° 31′ N. lat., 156° 20′ W. long., then east to a point at 55° 31′ N. lat., 151° 05′ W. long., then northeast to a point east of the Barren Islands 58° 52′ N. lat., 148° W. long., then west to Cape Douglas at 58° N. lat., 153° 15′ 30″ W. long.;

(2) in the Cook Inlet area, an area bounded by a line beginning at Cape Douglas at 58° 52′ N. lat., 153° 15′ 30″ W. long., then east to a point at 58° 52′ N. lat., 148° 50′ W. long., then north to Cape Fairfield on the mainland of Alaska.

Authority: A.S. 16.05.250(2)
A.S. 16.10.200

Rules

Rule 37, Alaska Rules of Criminal Procedure

Rule 37. Search and Seizure.

(a) Search Warrant—Issuance and Contents.

(1) A search warrant authorized by law shall issue only on

(i) (aa) affidavit sworn to before a judge or magistrate or any person authorized to take oaths under the law of the state, or

(bb) sworn testimony taken on the record in court, and

(ii) establishing the grounds for issuing the warrant.

(2) If the judge or magistrate is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant

(i) identifying the property, and

(ii) naming or describing the person or place to be searched.

(3) The warrant

(i) shall be directed to a peace officer of the state authorized to enforce or assist in enforcing any law thereof, and

(ii) shall state the ground or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof, and

(iii) shall command the officer to search forthwith the person or place named for the property specified, and

(iv) shall direct that it be served between 7:00 a.m. and 10:00 p.m., but if an affiant is positive that the prop-

erty is on the person or in the place to be searched, the warrant may direct that it be served at any time, and

(v) shall designate the judge or the magistrate to whom it shall be returned.

(b) Execution and Return With Inventory. The warrant shall be executed and returned within 10 days after its date. The officer taking property under the warrant

(1) shall give to the person from whom or from whose premises the property was taken a copy of the warrant, a copy of the supporting affidavits, and receipt for the property taken, or

(2) shall leave the copies and the receipt at the place from which the property was taken.

The return shall be made promptly and shall be accompanied by a written inventory of any property taken as a result of the search pursuant to or in conjunction with the warrant. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be signed by the officer under the penalty of perjury pursuant to A.S. 09.65.012. The judge or magistrate shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(c) Motion for Return of Property and to Suppress Evidence

A person aggrieved by an unlawful search and seizure may move the court in the judicial district in which the property was seized or the court in which the property may be used for the return of the property and to suppress for use as evidence anything so obtained on the ground that the property was illegally seized.

(d) In Camera Hearing. A person who challenges the validity of a search and seizure predicated on information gained from an informant used either in

(1) support of an application for a warrant, or

(2) as the basis of a search without warrant

may move the court for disclosure of the identity of the informant pursuant to Rule 16. In the event the court determines that disclosure of the identity of the informant is not required under Rule 16, the court shall conduct an in camera recorded hearing in which it shall investigate and take evidence so as to determine whether or not a search based on the informant's information was justified. Following the in camera hearing, the court shall grant or deny the motion to suppress on the record, and shall make written findings concerning the validity of the search based on the informer's information. The written findings, together with the record of the hearing, shall be sealed, and if the validity of the search is upheld the sealed testimony and findings shall, on appeal of a conviction in which evidence of the search was admitted, be transmitted to the supreme court for automatic review of the motion to suppress. (Amended by Chapter 17 SLA 1969 effective June 25, 1969 and by Supreme Court Order 157 effective February 15, 1973)

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CLERK

IN THE

Supreme Court of the United States

October Term 1981

No. _____

THE F/V AMERICAN EAGLE, ADF&G No. 39 and $100,677.50 REPRESENTING THE PROCEEDS OF 143,825 LBS. OF ALASKA KING CRAB DELIVERED PURSUANT TO ADF&G FISH TICKET NOS. E95626 and E95627,

Appellant,

vs.

STATE OF ALASKA,

Appellee.

ON APPEAL FROM THE
SUPREME COURT OF THE STATE OF ALASKA

APPELLANT'S BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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vs.

STATE OF ALASKA,

Appellee.

ON APPEAL FROM THE
SUPREME COURT OF THE STATE OF ALASKA

APPELLANT'S BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

ARGUMENT

A. THE ALASKA SUPREME COURT HAS STATED THAT THE FEDERAL CONSTITUTIONAL ISSUES RAISED IN THIS CASE ARE SUBSTANTIAL AND HAS URGED REVIEW BY THIS COURT.

Alaska concedes that the federal constitutional issues in this case were raised in a timely manner but contests their substantiality. The Alaska Supreme Court, in the very decisions at issue, has stated that the issues are substantial and should be reviewed by the United States Supreme Court.

The question of extraterritorial jurisdiction raised in this case was first decided in *State v. Bundrant*, 546 P.2d 530 (Alaska), *appeal dismissed* (for want of jurisdiction) *sub nom*, Uri v. State, 429 U.S. 809 (1976). In its opinion the Alaska Supreme Court stated:

> This court acknowledges its duty not to declare statutes unconstitutional unless such repugnancy clearly appears. We moreover acknowledge that our decision today may provide the most effective vehicle for assuring that this matter will at least receive the prompt and definitive attention by the final arbiters of such questions—the Congress or the Supreme Court of the United States.

546 P.2d at 548. (Footnote omitted.)

On the appeal of *Uri* to this Court the state argued that review should not be granted because the decision below was not final. There was some merit to that argument; upon remand the cases were dismissed because of the impermissible vagueness of the regulations at issue.[1] When the same issues were presented in this case, the Alaska Supreme Court simply reaffirmed its decision in *Bundrant*, 620 P.2d at 663. There is no dispute about finality in this case and the issue of extraterritorial state jurisdiction should now receive the attention of this Court.

In its decision below, the Alaska Supreme Court while disagreeing with the interpretation of the regulations urged by the owners, acknowledged that "the ambiguity in the language employed in the regulations is evident." 620 P.2d at 664, Appendix A to Jurisdictional Statement at A-22. The court stated in the next portion of its opinion:

> The owners of the American Eagle also complain they were denied due process of law in that the forfeiture statutes under which the vessel, gear, and sale proceeds were seized provide for no *in rem* procedure or prompt post-seizure notice

1. *Uri III* (see Appendix G to the Jurisdictional Statement). Those same regulations are at issue here. See Argument III, *infra*.

> and hearing. Given this broad deficiency, the owners, in our opinion, have raised a substantial question whether the statutory scheme on its face affords adequate procedural due process . . .

620 P.2d at 666 (Footnote omitted). Appendix A to Jurisdictional Statement at A-31-32.

Given the express statements on the significance of these issues by the court below, it is difficult to credit the state's argument that they are not substantial.

B. THE ALASKA SUPREME COURT'S DECISIONS IN *BUNDRANT* AND *AMERICAN EAGLE* ON EXTRATERRITORIAL JURISDICTION ARE CONTRARY TO ALL OTHER LEGAL AUTHORITY.

Alaska's decision in *Bundrant* and *American Eagle* asserting jurisdiction over noncitizens outside the state's territorial waters are unsupported by the decisions of this Court or in other jurisdictions. The state has failed to distinguish *Skiriotes v. Florida*, 313 U.S. 69 (1941), and *Alaska v. Arctic Maid*, 366 U.S. 199, 203 (1961), which support appellant's contention that Alaska has no jurisdiction over the activities of the AMERICAN EAGLE outside the jurisdictional waters of Alaska.

The state misunderstands *Northwest Trollers Association v. Moos*, 89 Wn.2d 1, 568 P.2d 793 (1977). The court's decision that Washington's fishing regulations were invalid was based directly on the holding that Washington cannot regulate fishing beyond its three mile limit by Oregon or California citizens.

Alaska is also inaccurate in its description of *Hjelle v. Brooks*, 377 Supp. 430 (D. Alaska 1974). The findings in *Hjelle* are the only judicial findings relevant to this appeal. In that case the three judge court determined that there was no significant crab fishing in Alaska waters, and issued a preliminary injunction prohibiting extraterritorial enforcement of Alaska's regulations, *see* 377 F.

Supp. at 441. The findings in *Hjelle* remain as the only factual determinations by any court on the state's nexus theory.[2]

United States v. Sylvester, 605 F.2d 474 (9th Cir. 1979), is not relevant to this case because Sylvester was convicted for illegal sales within the state. The alleged illegal activity of the AMERICAN EAGLE took place outside Alaska and no landing law is involved.[3]

The state is in error when it asserts that the AMERICAN EAGLE was registered in Alaska. (S.Br. 9.) The AMERICAN EAGLE was registered under federal law at the Port of Seattle as shown by the vessel's Certificate of Registry. (R 570.) While appellant did take out an Alaska fishing license to avoid criminal sanction, that action under compulsion does not constitute consent to extraterritorial jurisdiction. The Fisheries Conservation and Management Act does not expand the power of the states to regulate outside their territory and specifically provides that a state may do so only with respect to vessels registered under its laws. 16 U.S.C. § 1856.[4]

The position of the United States on the issue of Alaska's asserted extraterritorial jurisdiction was presented by the Department of Justice in its *amicus curiae*

2. In *State v. Uri* (*Uri I*) (involving sixteen fishermen) Justice Burke of the Alaska Supreme court (then superior court judge) granted a motion to dismiss the complaints involving fishing more than three miles from shore based on a determination that such regulation would be in conflict with an area of exclusive federal jurisdiction. See Appendix L to Jurisdictional Statement. No factual evidence was presented. In *Bundrant*, which was also dismissed by the trial court, the lone appellant stipulated to certain facts applicable for the purpose of his appeal only.

3. "Landing law" is a term applied to laws that close hunting or fishing throughout a state and prohibit the possession of such fish or game within the state, precluding the defense that contraband was taken outside the state. The discussion of nexus in such cases presents a different issue from the regulation of activity entirely outside the state. *Cf. Hjelle v. Brooks*, *supra*, 377 F. Spp. at 440; *State v. Uri* (*Uri I*), Appendix L to Jurisdictional Statement at A-187.

4. There is dicta in *People v. Weeren*, 163 Cal. Rptr. 255, 607 P.2d 1279 (Cal. 1980), *Cert. denied*, ____ U.S. ___ , 66 L. Ed. 2d 45 (1980), construing registration to include fishing licenses, but that conflicts with a Department of Justice memorandum supporting the view that registration is co-extensive with federal documentation or state ownership registration. See Appendix A to this brief.

brief in *Bundrant*, a copy of which is attached as Appendix B. In its brief the United States stated unequivocally that it asserted exclusive jurisdiction over natural resources of the outer continental shelf, including crab and other living resources of the shelf.[5] The United States also argued that Alaska could not regulate the high seas activities of non-Alaskans. The internal memorandum of Mr. Johnson of NOAA, Appendix F to the State's Motion, does not state the position of the United States.

C. THE UNITED STATES HAS INDEED CLAIMED CRAB AS A SHELF RESOURCE.

The state argues that the OCSLA does not expressly mention king crab as a shelf resource. However, the Federal Government has clearly claimed and defined crab as a living shelf resource in other statutes. These statutes include the Submerged Lands Act,[6] and in particular the Bartlett Act,[7] which applied during the case period but which was replaced in substantially identical text by the FCMA.[8] Alaska presents no argument to these statutes. Its quotation from the OCSLA legislative history that marine life above the land itself was not preempted (Motion to Dismiss, p. 11) does not apply to sedentary species.

5. *See also* the dissenting opinions of Justice Connor in *Bundrant*, 546 P.2d at 559, *State v. Sieminski*, 556 P.2d 929, 935 (Alaska 1976), and in the opinion below. 620 P.2d at 674, Appendix A to Jurisdictional Statement at A-67. Alaska quotes material concerning the Outer Continental Shelf Lands Act purporting to show that crab were not included as shelf resources. As Justice Connor pointed out in his dissent in *Bundrant*, only those species "above the land itself" were excluded from coverage by the OCSLA. 546 P.2d at 561. The federal statutes and treaties cited by Justice Connor and in the briefs expressly include king crab as a shelf resource because they are in constant contact with the shelf, although mobile.

6. "The term 'natural resources' includes, without limiting the generality thereof, oil, gas, and all other minerals, and fish, shrimp, oysters, claims, crabs...." 43 U.S.C. § 1301(3). "Nothing in this chapter shall be deemed to affect in any wise the rights of the United States to the natural resources of that portion of the subsoil and seabed of the Continental Shelf lying seaward... all of which natural resources appertain to the United States...." 43 U.S.C. § 1302.

7. "As used in this chapter, the term 'Continental Shelf fishery resource' means... including the following species... king crab." 16 U.S.C. § 1085.

8. "The term 'Continental Shelf fishery resources' means the following... king crab." 16 U.S.C. § 1802.

D. THE STATE'S VAGUENESS ARGUMENT FAILS EVEN TO MENTION THAT ONLY REGISTRATION AREAS WERE SUBJECT TO CLOSURE UNDER THE REGULATIONS AND NOWHERE WAS THE OUTER LIMIT OF THE REGISTRATION AREA DEFINED.

The state's response to the appellants' vagueness argument carefully omits any mention of the words "registration area." This strategic decision to attempt to focus attention elsewhere cannot avoid the critical issues:

1. Only *registration areas* were closed to crab fishing under the regulations—not statistical areas, not districts;[9]

2. Nowhere was the outer boundary of any registration area defined, except by application of the general definition of "waters of Alaska" which extend three miles from shore.[10]

The only geographic area within which a fishing vessel was subject to penal sanction was within the *registration area*. This is discussed in detail in the Jurisdictional Statement at 19-20. Alaska has submitted no response.

The state's brief describes the purpose of the regulations as protecting king crab resources within what it calls the "regulated area"—a term never used in the regulations. (Motion to Dismiss p. 18.) It goes on to say:

> Nowhere is their application restricted to waters inside three miles. On the contrary, the seaward boundary of *Statistical Area 0* is unambiguously defined as 800 fathoms (5 AAC 34.600)

9. *See* 5 AAC 34.005(b), .035 and .610. These regulations as well as the current regulations are reprinted in Appendix C. The current regulations were adopted after the decisions in *State v. Uri* (*Uri III*) and *State v. the F/V Quinhagak* (Appendices G and H to the Jurisdictional Statement) which held the regulations at issue here to be impermissibly vague. The current regulations clearly define the outer limit of the registration areas as three miles from the shore and change the law by making closures and other regulatory provisions applicable to both registration areas and the adjacent seaward biological influence zones (*i.e.*, throughout each statistical area).

Appendix K in the Jurisdictional Statement is unclear because of layout and errors in headings, and Appendix C to this brief should be substituted for it.

10. 5 AAC 39.975(13).

> and the definitions of the Egg Island *District* in 5 AAC 34.605(c) encompasses "all waters of statistical area 0. (Emphasis added.)

Motion to Dismiss p. 19. By slight of hand, the state's argument creates the impression that the entire statistical area was regulated and subject to closure. That is just not so. The statistical area was made up of both a registration area and an adjacent seaward biological influence zone. Only the registration area was subject to closure, and its outer boundary was not defined. As held by the court in *Uri III*, the terms "registration areas" and "statistical areas" are not synonymous. Definition of a statistical area or a district within that area told the appellants nothing about where the registration area ended or where the state's closure regulations applied.[11] Based on 5 AAC 39.975(13) and the case law at the time. (Hjelle v. Brooks and *Uri I*), the only reasonable interpretation was that state regulation ended at the three mile limit. Any ambiguity must be construed against the state. Appellants and similarly situated fishermen cannot be forced to guess at their peril.

E. THE ABSENCE OF ANY DUE PROCESS PROCEDURE COMPELS CLAIMANTS TO NEGOTIATE WITHOUT ANY NOTICE OF THEIR RIGHTS OR ASSURANCE THAT THOSE RIGHTS WILL BE PROTECTED.

It is indisputable that no due process procedure is provided by Alaska statute or rule regarding seizure of vessels or other property. The text of AS 16.05.190 and .195 is all there is.

Alaska's reliance on Criminal Rule 37 is evidence of the void of procedural protection. That argument was not even

11. The terms and definitions at issue here were the same for *all* statistical and registration areas. 5 AAC 34.005 and .035 apply to both area 0 (Egg Island) and area Q (Bering Sea). The State's purported distinction between the two areas ignores the words of the regulations themselves.

advanced by the state until the case was before the Alaska Supreme Court. The criminal rules state on their face that they are applicable only in criminal cases, not civil proceedings such as this one. Criminal Rule 1. Other criminal rules and protections such as the presumption of innocence are not applicable. The state may not, after the fact, permit selective use of criminal rules to patch over defects in its procedures, while never providing any notice to citizens (who must act immediately to protect their property) as to what rules and procedures apply to civil forfeiture proceedings.

The defect in due process in this case is twofold. First, there was no requirement for a prompt hearing. Second, none was granted. The state's brief creates the impression that claimants sought delay. Its assertions in that regard are unsupported in the record, were not presented to the court below, and are without basis in fact. The simple fact is that substantial delay did occur because no procedure was provided to ensure due process and neither side was certain which rules should govern.

The important point is that as long as the rights of claimants remain undefined, the state enjoys excessive negotiating power.[12] If a vessel owner declines to pay the sum demanded by the state to avoid having his vessel seized, a procedure must be agreed upon and a bond must be negotiated. Even then, the terms of an agreed procedure may be subject to argument and a new attorney may seek to renege on an agreement already reached.[13]

12. The State asserts that only five vessels have been seized by Alaska since 1976. Motion to Dismiss p. 22, n.9. This omits the cases where settlements were extracted before physical seizure took place. The absence of any procedure and the great economic cost of lost fishing time compels quick settlements on the state's terms to avoid seizure.

13. The state's effort to reseize the AMERICAN EAGLE after the trial below, even though a bond had been posted, illustrates the risk of proceeding through the ad hoc process that the state here defends.

Due process requires a clear and understandable procedure so that claimants will have notice how to proceed if their property is seized and some statement as to their rights.

The mitigation issue is straightforward: is the shoreside owner of a vessel which is forfeited for a fishing violation to be denied his right to due process merely because his compensation is related to the profits of the vessel? The two owners in this case had no knowledge or involvement in the alleged violations, yet were denied any consideration as to mitigation of penalty simply because their income was related to earnings from a lawful venture.

CONCLUSION

This court should summarily reverse or, in the alternative, accept briefs and argument on the merits.

Dated this 4th day of September, 1981.

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Attorneys for Appellants

Appendix A

March 7, 1977

Honorable Les AuCoin
House of Representatives
Washington, D.C. 20515

Dear Congressman AuCoin:

This is in response to your letters of January 6 and February 3, 1977, requesting a Justice Department interpretation of section 306(a) of the Fisheries Management and Conservation Act of 1976 and assistance in drafting language that would bring Oregon's law into conformance with Federal law.

Section 306(a) provides in part that:

> * * * No State may directly or indirectly regulate any fishing which is engaged in by any fishing vessel outside its boundaries, unless such vessel is registered under the laws of such State.

As you have pointed out, the meaning of the term "vessel * * * registered under the laws of such State" is not clear. States do not normally register fishing vessels, and neither the Act nor its legislative history gives any indication of what Congress intended by this language. Since the Department of Justice took no part in its drafting, we are unable to provide any insight into its original purpose.

Nor would any opinion we might give on the subject be conclusive. The language will ultimately have to be interpreted by the courts or amended by Congress to remedy the existing confusion. We believe that amendment of the Act is the preferable solution.

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It is difficult in the absence of guidance from Congress on this question to discuss possible amendments to section 306(a). However, we would note that existing Federal law may provide a convenient basis for delimiting State authority under the Act. Federal law provides for the documentation and registration of large vessels and numbering under State law of smaller vessels. Vessels that are subject to documentation and registration must designate a home port. It could be said that the State in which a vessel is home ported would have a sufficient nexus to the vessel and its crew to justify the exercise of jurisdiction anticipated in the Act. Presumably, that nexus would be even stronger in relation to smaller vessels numbered under State law. Moreover, an amendment incorporating this concept would obviate the need for changes in State law. If Congress determines that a clarification of this nature is desirable, the following amendment to section 306(a) would accomplish that purpose:

> * * * No State may directly or indirectly regulate any fishing vessel outside its boundaries, unless such vessel is documented, licensed or enrolled under Federal law and has its home port in the State or is numbered by that State pursuant to section 17 of the Federal Boat Safety Act of 1971 (85 Stat. 220).

Sincerely,

Anthony C. Liotta
Acting Assistant Attorney General
Land and Natural Resources Division

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Appendix B

THE SUPREME COURT OF THE STATE OF ALASKA

STATE OF ALASKA, Appellant v. CHARLES BUNDRANT, Appellee	File No. 2295
STATE OF ALASKA Appellant v. KONRAD S. URI, et. al., Appellees	File No. 2435
STATE OF ALSAKA, Appellant v. CORY A. KALDESTAD, Appellee	File No. 2444

Appeal from the Superior Court
of the State of Alaska, Third Judicial District

BRIEF OF THE UNITED STATES
AS AMICUS CURIAE

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THE INTEREST OF THE UNITED STATES

The case involves an assertion of criminal jurisdiction by the State of Alaska over the taking of king crab on the high seas of the Bering Sea. Defendants are charged with violating Alaskan regulations by engaging in activities which are said to have taken place at least 16 miles from the coast of Alaska. The United States is interested both in the resources of the continental shelf over which the State has attempted to assert control and the assertions of police power jurisdiction by the State seaward of the territorial sea. The Superior Court for the State of Alaska, Third Judicial District, dismissed the complaints.

The decision of the court below is predicated on its conclusion that the Federal Government has claimed exclusive jurisdiction over the resources of the outer continental shelf. The United States agrees with that conclusion. However, we understand that the State of Alaska disagrees, at least as to the kind of resources over which a federal claim has been made, and that absent a federal claim the State claims extensive extraterritorial authority over the crab fishery of the outer continental shelf. The purpose of this brief is to advise the Court that the Federal Government does claim exclusive federal jurisdiction over natural resources of the outer continental shelf, including king crab, and to state the position of the Federal Government on the question of Alaska's authority to assert extraterritorial jurisdiction over non-Alaskans.

STATEMENT OF ISSUES

1. Whether the Federal Government has claimed exclusive jurisdiction over natural resources of the outer continental shelf.

2. Whether, in the absence of an exclusive federal claim to the living resources of the outer continental shelf the State of Alaska may assert jurisdiction over the activities of non-Alaskans on the high seas.

SUMMARY OF ARGUMENT

1. The Federal Government has asserted exclusive jurisdiction over natural resources of the outer continental shelf since 1945. This claim applies to both mineral and living resources of the outer continental shelf, and has been recognized by international agreement, domestic litigation and federal legislation. The claim has been asserted vis a vis other nations and recognized in international law, as evidenced by the Convention on the Continental Shelf. It has also been asserted vis a vis the adjacent coastal states of the United States, as evidenced by the "tidelands" litigation and the Outer Continental Shelf Lands Act.

2. The State of Alaska may not normally assert jurisdiction over non-citizens on the high seas. Beyond the territorial sea the State may only exercise police power over its own citizens engaged in activities in which the State has a legitimate interest. The State has no jurisdiction over the activities of non-citizens on the high seas.

ARGUMENT

I

THE UNITED STATES HAS CLAIMED THE EXCLUSIVE RIGHT TO RESOURCES OF THE OUTER CONTINENTAL SHELF SINCE SEPTEMBER 28, 1945

The history of the United States claim to resources of the outer continental shelf is well known and would seem to be beyond dispute. On September 28, 1945, President Truman issued his now famous proclamation stating that "the United States regards the natural resources of the subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control." Proclamation

No. 2667 (58 Stat. 884). This claim was implemented by Congress in 1953 through the Outer Continental Shelf Lands Act, 67 Stat. 462, 43 U.S.C. 1331. In 1958 the community of nations codified international law on the subject in the Convention on the Continental Shelf, 15 U.S.T. 471 which recognized the exclusive rights of coastal nations over natural resources of their adjacent continental shelves for the purpose of exploration and exploitation. The Convention came into force June 10, 1964. Later in 1964 sanctions were provided against foreigners who wrongfully harvest the resources of our continental shelf, 78 Stat. 194, 16 U.S.C. 1081.

Apparently Alaska is taking the position in this litigation that although the United States has clearly claimed exclusive rights to living resources of the continental shelf internationally, neither the tidelands litigation nor the Outer Continental Shelf Lands Act makes an exclusive claim to these resources vis a vis the coastal States. In fact no court decision,[1] legislation, or international claim distinguished between living and non-living resources of the shelf. In pre-Submerged Lands Act litigation the Supreme Court stated that the United States has paramount rights in, and full dominion and power over, the lands, minerals and other things underlying the ocean seaward of the low-water line. United States v. Louisiana, 339 U.S. 699; United States v. Texas, 339 U.S. 707.

The early tidelands litigation, like the Truman Proclamation before it, may have been precipitated by the presence of offshore oil but the broad language of these decrees was no coincidence. In the first Texas case the Court remarked that: "Today the controversy is over oil. Tomorrow it may be over some other substance or mineral or perhaps the bed of the ocean itself. If the property, whatever it might be, lies seaward of the low-water mark, its use, disposition, management and control involve national interests and national responsibilities.

1 The more important of these cases are completely and accurately discussed in Brief of Appellees, pages 8-13, and we will not review them here.

That is the source of the national rights in it." 339 U.S. 707, 719. The Supreme Court was explicitly recognizing the exclusive federal right to all continental shelf resources.

In testimony preceding passage of the Submerged Lands Act Congress was reminded that:

> The Court has three times held that the Federal Government has full dominion and imperium over the submerged land and its resources, as against the States, and that it is possessed of whatever is the most accurate description of the full power and right to take and enjoy the complete benefit of the mineral and other resources of the bed of the sea. Statement of Philip B. Perlman, Solicitor General of the United States, March 28, 1951, Submerged Lands Hearings before the Committee on Interior and Insular Affairs, U.S. Senate, 82d Cong., 1st sess., on S.J. Res. 20, p. 376.

Congress then, through the Submerged Lands Act, expressly granted to the States exclusive rights to natural resources in the territorial sea. The resources involved are listed in section 2(e) of that Act and include both living and non-living resources.

The Outer Continental Shelf Lands Act just as clearly preserved the already established exclusive federal rights beyond the limits of that grant. In United States v. Ray, the Fifth Circuit Court of Appeals upheld the trial court's finding that coral reefs more than 3 miles off the coast of Florida "are 'natural' resources within the Outer Continental Shelf Lands Act," 423 F.2d 16, 19. The lower court had concluded that "whatever proprietary interest exists with respect to those reefs belongs to the United States under both national and international law."

Even prior to the Convention on the Continental Shelf, the United States made clear to the world that the Outer Continental Shelf Lands Act claimed living resources of the shelf for the United States. A common topic of discussion in the International law Commission, the United Nations body designated to prepare the draft articles which later became the Continental Shelf Convention, was what living resources of the continental shelf came within national

shelf came within national jurisdiction. During discussions of the Commission, Mr. Edmonds, the United States delegate, stated that "The United States had repeatedly maintained that the living natural resources of the subsoil and seabed, as covered by that legislation [the Outer Continental Shelf Lands Act] included only those in attached forms, which was confirmed in a subsequent section." Yearbook of the International Law Commission (1956) Vol. 1, p. 143.

The Convention ultimately adopted this position, using slightly different language in Article 2(4).[2] The Court in United States v. Ray recognized that the Convention had merely "confirmed and crystallized" the already existing rights in the natural resources of the continental shelf. 423 F.2d 16, 21.[3]

King crab, like coral, is a living resource of the shelf. President Truman claimed "natural resources" for the United States in 1945. The Supreme Court held on a number of occasions that the Federal Government rather than the States had

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2 "The natural resources referred to in these articles consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil."

3 The State of California, in its brief Amicus Curiae in this litgation, notes that the Outer Continental Shelf Lands Act did not restrict the long recognized right of freedom to "fish" on the high seas. Neither, of course, did the Continental Shelf Convention. However, it is clear that each document referred to the taking of free swimming fish, not creatures of the shelf. Taking continental shelf resources, which the Act and the Convention recognized as belonging to the coastal nation, is not "fishing" within the meaning of either. To find otherwise would be to conclude that the Continental Shelf Convention and 16 U.S.C. 1081, which prohibits foreigners from taking crab from our continental shelf, are inconsistent with Article 3 of the Continental Shelf Convention and Article 2(2) of the High Seas Conventions, which acknowledge the freedom to fish on the high seas. They are not inconsistent. There is no freedom to "fish" for crab, coral or oil for that matter on another nation's continental shelf.

jurisdiction over such resources beneath the seas. Congress granted to the States authority over the resources to the limits of the territorial sea but at the same time reaffirmed federal jurisdiction beyond. And that exclusive federal right beyond the territorial sea has been recognized by the courts with respect to both mineral and living resources of the outer continental shelf.

II

THE STATE OF ALASKA MAY NOT REGULATE THE HIGH SEAS ACTIVITIES OF NON-ALASKANS

Assuming for the moment that the United States had not claimed exclusive jurisdiction over the living resources of the outer continental shelf, Alaska apparently claims authority to regulate the crab fishery on the high seas regardless of the citizenship of the fishermen involved. This the State cannot do. In the very first dispute between the Federal Government and California over offshore jurisdiction, the Supreme Court recognized that:

> * * * whatever any nation does in the open sea, which detracts from its common usefulness to nations, or which another nation may charge detracts from it, is a question for consideration among nations as such, and not their separate governmental units. What this Government does, or even what the States do, anywhere in the ocean, is a subject upon which the nation may enter into and assume treaty or other international obligations. United States v. California, 332 U.S. 19, 35.

The present state regulatory system presents the very potential for international conflict of which the Supreme Court warned. Although the defendants here are American citizens there does not appear to be anything in the Alaska statute or regulations which would prevent their application against non-Americans. Indeed, Alaska's theories of jurisdiction over the

crab "fishery" on the high seas, although not always entirely clear, would seem to apply equally to non-Americans as they have been applied to citizens of Washington. This is indeed what the Supreme Court described as "a subject upon which the nation may enter into and assume treaty or other international obligations," as has been done with the Soviet Union and Japan in the Bering Sea.[4] As an exercise of its exclusive jurisdiction, the United States has also enacted a general prohibition against foreign exploitation of our shelf resources, 82 Stat. 445, 16 U.S.C. 1081, and specifically included king crab among the protected resources. 16 U.S.C. 1085 and 50 C.F.R. 295.

Alaska simply lacks jurisdiction over the activities of foreigners beyond her borders. In an attempt to justify her assertions of jurisdiction in this instance the State relies on three separate contentions. First that State jurisdiction extends to the limits of national jurisdiction. Next that a State may extend its political sovereignty beyond her nomral boundaries. And finally that the State may assert personal jurisdiction over non-citizens even beyond her boundaries. None of the authorities cited by Alaska supports these contentions.

A. Alaska's jurisdiction over resources of the continental shelf does not extend to the limits of federal jurisdiction. – Although the State asserts that its jurisdiction over the shelf extends to the limits of federal jurisdiction the State appears to place little reliance on this theory and properly so.[5] The Supreme Court has often faced this issue in 30 years of litigation between the United States and the coastal States and has without exception rules that the only rights of the States over the resources of the continental shelf are derived from the Submerged Lands Act grant from Congress. Prior to that grant the States had no rights to these resources. United States v. California, 332 U.S. 19; United States v. Maine, et al., 43 L.W. 4359.

4 U.S./USSR Agreement Relating to Fishing for King Crab, T.I.A.S. 7515; U.S./Japan Agreement regarding the King and Tanner Crab Fisheries in the Eastern Bering Sea, T.I.A.S. 7986.

5 Alaska's Memorandum in Support Opposition to Motion to Dismiss and to Suppress, in Superior Court for State of Alaska, pp. 18-19.

Under the Act the States were granted certain rights expressly limited to the 3-mile marginal sea.[6] Supra, pp. 7 to 10.

Rights of the United States to resources of the outer continental shelf are based on international law. The Convention on the Continental Shelf, 15 U.S.T. 473, codified the international law on this subject, recognizing the exclusive rights of coastal nations to the natural resources of their adjacent continental shelves for the purpose of exploration and exploitation. Political subdivisions of coastal nations are not the subjects of international law and gain nothing from this Convention unless domestic law further distributes the rights. The United States has done this only through the Submerged Lands Act which limits Alaska's jurisdiction to an area measured 3 miles from the low-water line and closing lines across the mouths of inland waters. 43 U.S.C. 1301(2) (c).

B. Alaska's "Political Sovereignty" over the resources of the sea does not extend beyond the limits of her Submerged Lands Act grant. – Alaska appears to rely heavily on Manchester v. Massachusetts, 139 U.S. 240, and Toomer v. Witsell, 334 U.S. 385, to support an argument that a State may unilaterally extend its boundaries to regulate offshore fisheries. Neither case supports such a proposition.

In Manchester the defendant, a citizen of Rhode Island, was arrested for fishing within 1.25 miles of the Massachusetts shore in Buzzards Bay. The Bay, having a mouth of less than 6 nautical miles, is clearly part of the inland water of the United States. The sole concern of the Court was whether a State had jurisdiction over any fisheries activities in a tidal area seaward of the low-water mark and it concluded that, "the subject (fishing) is one which a State may well be permitted to regulate within its territory, in the absence of any regulation by the United States." 139 U.S. 240, 265.

The effect of Manchester was the finding that Buzzards Bay, part of the inland waters of the United States, was also

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6 With the exception of Gulf Coast States which were given an opportunity to prove historic boundaries of up to 3 leagues. 43 U.S.C. 1301(2) (b).

part of Massachusetts. The Court noted, quoting from United States v. Bevans, 3 Wheat. 336, that, "The jurisdiction of a State is coextensive with its territory; coextensive with its legislative power." 139 U.S. 240, 263. According to the Supreme Court in United States v. California, 332 U.S. 19, "the illegal fishing charged was in Buzzards Bay, found to be within Massachusetts territory, and no question whatever was raised or decided as to title or paramount rights in the open sea." 332 U.S. 19, 37.

Toomer v. Witsell presents a similar problem in which the Court recognized an extension of state jurisdiction beyond that treated in Manchester, that is inland waters, to the limit of the territorial sea. The State of South Carolina had enacted regulations governing the taking of shrimp within 3 miles of its coast. Fishermen from Georgia sought to enjoin enforcement of those regulations against them. A three-judge federal court sustained the State's regulations and the Supreme Court affirmed, holding that:

> Since the present case evinces no conflict between South Carolina's regulatory scheme and any assertion of federal power, the District Court properly concluded that the State has sufficient interests in the shrimp fishery within three miles of its coast so that it may exercise its police power to protect and regulate that fishery. 334 U.S. 385, 393.

Throughout the opinion in Toomer v. Witsell, the Supreme Court was careful to emphasize that the regulations applied only within the 3-mile limit, only within the undisputed territory of South Carolina. There is absolutely no basis for relying on either the Manchester or Toomer cases to support an attempted extension of state jurisdiction beyond the territorial sea.

Of course Alaska may not unilaterally extend her seaward boundaries as described in her Act of Admission, 72 Stat. 339, and the three-judge federal court in Hjelle v. Brooks found that the State has not done so. 377 F.Supp. 430, 440, That Court concluded that the regulations which it was

considering could be distinguished from proper landing laws because they attempted to control the taking of crab throughout the entire Bering Sea, thereby having a "direct impact on extra-territorial conduct. 377 F.Supp. at 441. The regulations have since been amended but their objectional effect remains. The State still seeks to control activities beyond its boundaries. This it cannot do except in the limited circumstances which we will now discuss involving citizens of that State engaged in activities within which the State has a legitimate interest and with respect to which there will be no conflict with an Act of Congress.

C. Alaska may not assert jurisdiction over the extra-territorial conduct of non-Alaskans. – As a final fallback position Alaska contends that she may assert jurisdiction over non-citizens of the State even beyond her territorial boundaries. This she clearly may not do unless the facts fit within one very limited exception. See page 20, infra. In this argument the State relies on the Supreme Court's decision in Skiriotes v. Florida, 313 U.S. 69, upholding the conviction of a sponge fisherman for violating Florida regulations by using diving gear to harvest sponges in the Gulf of Mexico. There was some question in the case as to whether the violation, which occurred 6 miles off-shore, was within the waters of Florida.[7] However, the Supreme Court based its decision solely on the citizenship of the defendant. A government may assert jurisdiction over its own citizens even beyond its territory. According to the Supreme Court in its Skiriotes opinion:

> * * * the United States is not debarred by any rule of international law from governing the conduct of its own citizens upon the high seas or even in foreign countries where the rights of other nations or their nationals are not infringed * * * [this authority is based upon] the duty of the citizen in relation to his own government. 313 U.S. 69, 73.

7 Florida is one of the States for which Congress had approved a 9-nautical mile boundary in the Gulf of Mexico. United States v. Florida, 363 U.S. 121.

Later the Court explained that the same principle could be applied to the relationship between a State and its citizens, saying:

> * * * If the United States may control the conduct of its citizens upon the high seas, we see no reason why the State of Florida may not likewise govern the conduct of its citizens upon the high seas with respect to matters in which the State has a legitimate interest and where there is not conflict with Acts of Congress. 313 U.S. 69, 77.

The Court specifically recognized that no interest of the United States or citizens of another State was involved, confirming that:

> * * * no question as to the authority of the United States over these waters or over the sponge fishery, is here involved. No right of a citzien of any other state is here asserted. The question is solely between appellant and his own State. 313 U.S. 69, 76.

The Court noted the distinction between this case and Manchester v. Massachusetts in which Massachusetts was permitted to regulate the activities of a Rhode Island citizen because he was within the boundaries of Massachusetts. Since the activities involved in the present litigation took place beyond the limits of Alaska, Manchester provides no precedent for the principle sought to be established, nor does Skiriotes with respect to any defendant who is not a citizen of Alaska.

More in point is Alaska v. Arctic Maid, 366 U.S. 199, in which the State attempted to tax the operations of salmon freezer boats operating within Bristol Bay but more than 3 miles from shore. The defendants were citizens of Washington and California. The State's interests were, of course, much the same as they are in this case. Salmon is an important resource of the Bering Sea and the Alaskan economy has long been influenced by it. Nevertheless, the Supreme Court concluded that "If the fish were taken or purchased outside Alaska's territorial waters, all of respondents' business in the Bristol Bay area

would be beyond Alaska's reach." 366 U.S. 199, 203. The instant case presents a similar situation.

Also in point is Hjelle v. Brooks in which a three-judge federal court enjoined the enforcement of Alaskan regulations designed to control crabbing in the Bering Sea. After reviewing a number of cases dealing with state conservation laws the Court concluded that to be constitutional a state regulation must be directed toward conserving a resource within the state. If so directed a regulation might have an indirect impact on extraterritorial conduct and yet be Constitutional. Typical of such regulations are landing laws administered to facilitate enforcement of conservation schemes for resources within the state. Such regulations may be enforced against non-citizens found within state boundaries. 377 F.Supp. 441.

At the other end of the spectrum are regulations having a direct impact on extraterritorial conduct. The Hjelle Court found that the Alaskan regulations which it was considering were concerned with conserving crab in the entire Bering Sea as well as within Alaskan territorial waters. Such a scheme could not withstand Constitutional attack. Alaska's revised regulations, with which we are concerned here, suffer from the same affirmity. They appear to seek to control extraterritorial conduct with little or no pretense of protecting an in state resource.

CONCLUSION

For the foregoing reasons the judgment of the court below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing Motion for Leave to File Brief Amicus Curiae and Participate in Oral Argument, Memorandum in Support of Motion, and Brief Amicus Curiae have been served on the Attorneys General of Alaska and California and counsel for defendants by placing copies of the same in the United States mail, postage prepaid, properly addressed to Mr. Roderick Walston, Deputy Attorney General, 6000 State Building, San Francisco, California 94102; Mr. Gerald Markham, Assistant Attorney General, 360 K Street, Anchorage, Alaska 99501; Mr. David B. Ruskin, Post Office Box 2073, Anchorage, Alaska 99501; Mr. Douglas Fryer, 3300 Seattle First National Bank Building, Seattle, Washington 98154; Mr. William B. Rozell, 311 Franklin Street, Suite 201, Juneau, Alaska 99801 on this 25th day of April, 1975.

Michael W. Reed
Attorney, Department of Justice
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REGULATIONS ADOPTED AFTER EARLIER REGULATIONS APPLIED TO THE AMERICAN EAGLE WERE DECLARED IMPERMISSIBLY VAGUE IN URL
(Emphasis added.)

5AAC 34.005

(b) Each statistical area consists of

(1) a registration area, comprised of all the waters within the statistical area which are territorial waters of Alaska; and

(2) an adjacent seaward biological influence zone, comprised of all the waters within the statistical area which are not part of the registration area.

(c) Registration areas are areas in which the department shall apply conservation and management regulations in order to protect and maintain the king crab resources of the state.

(d) Adjacent seaward biological influence zones are areas which the department shall utilize to obtain biological and fishing effort data and other information necessary for the formulation of comprehensive and effective conservation and management regulations governing king crab resources inhabiting the registration area. However, regulations governing the registration area will also be applied in the adjacent seaward biological influence zone consistent with sec. 10 of this chapter.

5AAC 34.010. APPLICATION OF REGULATIONS.

(a) Notwithstanding any other provision of this chapter, all regulations in this chapter applicable to a registration area shall be applicable also in its adjacent seaward biological influence zone.

REGULATIONS APPLICABLE TO THE AMERICAN EAGLE
(Emphasis added.)

5 AAC 34.005

(b) Each statistical area consists of:

(1) a registration area comprised of all the waters within the statistical area which are waters subject to the jurisdiction of the state; and

(2) an adjacent seaward biological influence zone, comprised of all the waters within the statistical area which are not part of the registration area.

(c) Registration areas are areas in which the department shall apply conservation and management regulations in order to protect and maintain the king crab resources of the state.

(d) Adjacent seaward biological influence zones are areas which the department shall utilize to obtain biological and fishing effort data and other information necessary for the formulation of comprehensive and effective conservation and management regulations governing king crab resources inhabiting waters subject to the jurisdiction of the state.

5 AAC 34.010 - [No such regulation in 1976.]

Appendix C

(b) Persons on a vessel navigating within an adjacent seaward biological influence zone shall conduct their operations and activities in full compliance with the regulations applicable to the appurtenant registration area.

(c) The commissioner may suspend the application of this section wholly or partially in any seaward biological influence zone if he finds that such application:

(1) does not tend to facilitate enforcement of regulations applicable to a registration area;

(2) does not tend to protect or conserve king crab inhabiting territorial waters of Alaska; or

(3) that the state has an insufficient interest in the king crab inhabiting the zone to warrant extension of the jurisdiction of the state to the zone.

5 AAC 34.035. CLOSURE OF REGISTRATION AREAS.

(a) The commissioner shall monitor the condition of king crab stocks in all statistical areas through use of such data and information as are practically available.

(b) When the commissioner finds that continued fishing effort would jeopardize the viability of king crab within a registration area, he shall close the registration area by emergency order. . . .

(f) The foregoing provisions of this section area applicable also to closures of district, subdistricts, sections, or any other portion of a statistical area.

5 AAC 34.035. CLOSURE OF REGISTRATION AREAS.

(a) The commissioner shall monitor the condition of king crab stocks in all statistical areas through use of such data and information as are practically available.

(b) When the commissioner finds that continued fishing effort would jeopardize the viability of king crab within a registration area, he shall close the registration area by emergency order. . . .

(f) [No subsection in 1976.]

5 AAC 34.091. UNLAWFUL ACTS WITHIN AN ADJACENT SEAWARD BIOLOGICAL INFLUENCE ZONE.

It is unlawful for any person [to take king crab or do other acts] . . . in violation of sec. 010(b) of this chapter.

5 AAC 34.610. FISHING SEASONS. King crab may be taken as follows:

(1) from 12:00 noon, September 15 through February 15 or until closed by emergency order, king crab 6-1/2 inches (165 mm) or greater in width of shell may be taken or possessed;

(2) during periods to be opened and closed by emergency order, king crab 7-1/2 inches (191 mm) or greater in width of shell may be taken or possessed.

5 AAC 34.091. [No such regulation in 1976.]

5AAC 34.610. FISHING SEASONS. king crab may be taken or possessed from 12:00 noon November 1 through February 15 unless the registration area is closed earlier by emergency order.

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CLERK

No. 80-2056

In the Supreme Court of the United States

OCTOBER TERM, 1981

THE F/V AMERICAN EAGLE, ET AL., APPELLANTS

v.

STATE OF ALASKA

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ALASKA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

The United States will address the following questions:

1. Whether the State of Alaska may assert jurisdiction over the taking and possession of king crab by non-Alaskans on the high seas beyond state territorial waters.

2. Whether, at the time of the violations at issue, State regulation was in any degree preempted because the federal government had asserted exclusive jurisdiction over natural resources, including sedentary marine species, of the outer continental shelf.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 80-2056

THE F/V AMERICAN EAGLE, ET AL., APPELLANTS

v.

STATE OF ALASKA

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ALASKA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation of October 5, 1981, to the Solicitor General to express the views of the United States.

STATEMENT

1. King crab, a highly mobile creature of the continental shelf, is important to the economy of the State of Alaska (J.S. App. A2, A13). A small share of crab may be harvested within the three-mile territorial limit off the State's coast (the territorial sea), but the significant crab fisheries are beyond

that limit. See *Hjelle* v. *Brooks*, 377 F. Supp. 430 (D. Alaska 1974) (three-judge court); *Alaska* v. *Bundrant*, 546 P.2d 530, 551 (Alaska), appeal dismissed *sub nom. Uri* v. *Alaska*, 429 U.S. 806 (1976). The latter include crab that are born within Alaskan territorial waters and migrate beyond the three-mile limit (J.S. App. A13).

The State has adopted regulations that it construes as applicable to the taking of crab both within the territorial sea and in a large area beyond in which large crab populations are found. The regulations divide the territorial sea and adjacent high seas into "statistical areas" in which crab populations are monitored, and "registration districts" within those areas, in which the State's laws with respect to the taking of crab are enforced (J.S. App. A18-A19, A23 n.18). The State Commissioner of the Department of Fish and Game has the power to close particular districts to all crab harvesting not only at certain preestablished times of the year but also, on an emergency basis, whenever he believes that "circumstances require" (Alaska Stat. § 16.05.060 (1977); J.S. App. A22-A23).[1] The regulations are not limited in their application to citizens of Alaska.

2. In January of 1976, the F/V American Eagle, a fishing vessel bearing a certificate of registry show-

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[1] The parties dispute the question whether, at the time the incidents at issue took place, the regulations clearly established that "registration districts" in which the State's laws would be enforced extended beyond the three-mile limit (compare State Motion to Dismiss or Affirm 18-19, with J.S. 18-20). The State takes the position that districts beyond the three-mile limit were covered, and the court below concluded that, whatever the "ambiguity" of the regulations, the State Commissioner was authorized to close areas beyond that limit to all crab harvesting (J.S. App. A22-A23).

ing Seattle, Washington, as its home port (R. 570) and owned by citizens of Washington, was seen harvesting king crab in the Egg Island District of King Crab Statistical Area "0," in the Aleutian Islands (J.S. App. A4-A5, A9, A88-A90). That area includes waters beyond the three-mile limit (*id.* at A10-A12 & n.9). The vessel had been licensed by Alaska in December 1975 to harvest king crab in another district in that statistical area, but the State had issued an emergency order closing the Egg Island District to crab harvesting after 12 noon on November 7, 1975, until further notice (*id.* at A87-A88).

When the vessel arrived at an Alaskan port on January 15, 1976, to unload its crab, it was seized by state officials, who subsequently filed a complaint in state superior court for forfeiture alleging violations of various regulations and emergency orders applicable to the taking and possession of king crab (J.S. App. A2-A4). The State did not attempt to prove at trial that the violations within the Egg Island District were within the State's territorial waters (*id.* at A11 n.9). The trial court found that the vessel had been used in violation of law through the "taking and possessing [of] King Crab within the Egg Island District between January 2-7th, 1976," when the district was closed to commercial crab harvesting (*id.* at A96). It accordingly declared forfeit the vessel, its on-board gear, and the proceeds from the sale of the crab catch (*id.* at A97).

3. The owners of the F/V American Eagle appealed to the Supreme Court of the State of Alaska, which affirmed the judgment of forfeiture (J.S. App. A1-A67). The owners contended, *inter alia*, that the State lacked jurisdiction to regulate the harvesting

of king crab in areas beyond the three-mile limit (J.S. App. A9).[2] The court rejected the argument (*id.* at A10-A15), relying on its earlier decision in *Alaska* v. *Bundrant, supra.*[3]

In *Bundrant*, the court reasoned that the State could validly prosecute out-of-state fishermen for "wholly extra-territorial activity," *i.e.*, taking and possessing crab within a closed area beyond the three-mile limit, because it was generally established that fishermen who harvested crab in that area would use processing facilities in Alaskan ports and because the unlimited taking of crabs that had migrated from Alaskan territorial waters beyond the three-mile limit would result in a decrease in the crab population within the State's territorial waters. 546 P.2d at 535-536, 552-554. The *Bundrant* court also rejected contentions that the regulation of crab fisheries beyond state territorial waters was an exclusively federal matter (546 P.2d at 538-544) and that state regulation had been preempted by the Outer Continental Shelf Lands Act, 43 U.S.C. 1331 *et seq.* (546 P.2d at 544-548).

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[2] The owners also appealed on several other grounds, including the contentions that the regulations at issue were unconstitutionally vague and that the absence of an in rem procedure and prompt hearing on the seizure denied them due process of law (J.S. App. A9). Those two contentions are included in the appeal to this Court (J.S. 14-25), but the United States takes no position on those questions.

[3] That appeal was dismissed for want of jurisdiction after the State filed an opposition arguing that there was no final order in the case. The charges against the out-of-state fishermen were dismissed after the case was remanded to the state trial court (see J.S. 8 n.4).

ARGUMENT

The decision of the Alaska Supreme Court is contrary to decisions of this Court on two independent grounds. It permits an unwarranted extraterritorial assertion of state jurisdiction over noncitizens, and it imposes state jurisdiction in an area and over a resource that, at least during the time of the events in question, were subject to exclusive federal jurisdiction. Although, in light of a subsequent federal enactment, the decision has only limited significance for the future, it ought not stand undisturbed. In the circumstances, the Court may wish to consider summarily reversing the judgment below.

1. *Extraterritorial exercise of jurisdiction.* As a general rule, state jurisdiction does not reach the activities of noncitizens beyond the boundaries of the State. Any attempt, through its courts " 'directly' to assert extraterritorial jurisdiction over persons or property would * * * exceed the inherent limits of the State's power" under the Due Process Clause (*Shaffer* v. *Heitner*, 433 U.S. 186, 197 (1977), quoting *Pennoyer* v. *Neff*, 95 U.S. 714, 732 (1878)), and, similarly, any attempt to make its substantive law directly applicable to commercial activities beyond its borders runs afoul of the Commerce Clause. See *Shafer* v. *Farmers Grain Co.*, 268 U.S. 189 (1925).[4]

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[4] The line of cases represented by *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970), relied on by Appellee Alaska (Motion to Dismiss or Affirm 3), does not support the decision below. *Pike* teaches that, in the case of a law that has only "incidental" effects on activities beyond the state's boundaries, the law's validity is to be determined by balancing the local interests promoted by the regulation against its burden on interstate commerce and by examining it for even-handedness. 397 U.S. at 142. A law that *directly* regulates activities beyond the state's borders, however, is invalid regardless of how it might fare under the balancing test.

The application of these principles to a State's exercise of jurisdiction over citizens of other states operating in ocean waters beyond its territorial limits was clearly enunciated in *Alaska* v. *Arctic Maid*, 366 U.S. 199 (1961), in which this Court reviewed an Alaska statute that purported to tax ships engaged in freezing salmon off the coast of Alaska.[5] The respondents, freezer ships owned by citizens of states other than Alaska, operated more than three miles off the coast of Alaska but processed salmon caught by smaller vessels both within and beyond state waters. The Court concluded that catching the fish was an extension of the freezer ships' operations and therefore a taxable event (366 U.S. at 202). It noted (*id.* at 203), however, that the State's taxing powers were limited to those fish caught within state waters: "If the fish were taken or purchased outside Alaska's territorial waters, all of respondents' business in the Bristol Bay area would be beyond Alaska's reach." The judgment against the vessels was, accordingly, reversed and the case remanded for a determination of what portion of the catch had been

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[5] While the constitutionality of a tax under the Commerce Clause may depend on factors somewhat different from those governing the constitutionality of regulation of commercial activity (compare, *e.g.*, *Exxon Corp.* v. *Wisconsin Department of Revenue*, 447 U.S. 207, 219-220 (1980), with *Pike* v. *Bruce Church, Inc.*, *supra*), the two types of state action are governed by a common principle. Whether the question is taxation or regulation, a State's attempt *directly* to impose liability on a person, corporate or natural, for activities that are wholly outside of the State is barred. This is analogous to limits on state court jurisdiction that, as the Court explained in *Shaffer* v. *Heitner*, *supra*, are imposed by the Due Process Clause.

taken beyond the borders of Alaska and was, therefore, not taxable. *Id.* at 205.

The situation of the crabbers here is analogous except that Alaska is proceeding against them *only* with respect to their harvesting of crabs beyond the State's territorial waters. Under *Arctic Maid*, such an exercise of jurisdiction is plainly improper.

The attempt of Alaska (Motion to Dismiss or Affirm 7-8) and the *Bundrant* court (546 P.2d at 549-550) to escape the application of this principle by reliance on *Skiriotes* v. *Florida*, 313 U.S. 69 (1941), and its progeny cannot succeed. In *Skiriotes* this Court acknowledged the power of Florida to apply its law respecting equipment permitted for the taking of sponges to the activities of one of its own citizens operating in an area beyond the State's territorial waters. The Court was careful to explain that its decision rested not on any determination that the State's general regulatory jurisdiction extended that far, but rather on the notion that the State could regulate the conduct of its own citizens. 313 U.S. at 76. As the Court noted, "No right of a citizen of any other State is here asserted." *Ibid.*[6]

The reliance of Alaska (Motion to Dismiss or Affirm 8) and the *Bundrant* court (546 P.2d at 551-552) on the so-called "landing law" cases is similarly ill-founded. In *Silz* v. *Hesterberg*, 211 U.S. 31 (1908), this Court upheld a New York law prohibiting the

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[6] Three cases cited by the *Bundrant* court as within "the *Skiriotes* line of cases" all involved states' regulation of the activities of their own citizens (546 P.2d at 549-550). See *Felton* v. *Hodges*, 374 F.2d 337 (5th Cir. 1967); *People* v. *Foretich*, 14 Cal. App. 3d Supp. 6, 92 Cal. Rptr. 481 (1970); *Gherra* v. *California Fish & Game Department*, No. 47823 (N.D. Cal. 1973) (unpublished opinion).

possession of game *within* the State during closed season, without regard to whether the game had been taken within or without the State. If the State were not permitted to foreclose the defense that game had originally been taken outside the State, enforcement of the law to protect the State's own game would have been impeded because the two categories of game were indistinguishable. 211 U.S. at 43. But Alaska did not obtain the forfeiture of the F/V American Eagle for any act occurring within the State's boundaries. *Silz* would control this case only if it had concerned a New York law providing for closed seasons in areas beyond the State's borders and the arrests of individuals for taking and possessing game out of season in those areas. See *Hjelle* v. *Brooks*, 377 F. Supp. 430, 441 (D. Alaska 1974) (three-judge court). Similarly *Bayside Fish Co.* v. *Gentry*, 297 U.S. 422 (1936), which concerned a law regulating the processing *within California* of sardines taken either within or without the State's territorial waters, is inapposite. As the Court noted (297 U.S. at 426), not only was the law's purpose to conserve fish found within the State's waters, but "[i]ts direct operation, intended and actual, [was] wholly local." That is not the case of the application of the regulations in this case.

Finally, contrary to the conclusion of the *Bundrant* court (546 P.2d at 550-551), Alaska's extraterritorial application of its laws regulating crab harvesting is not supported by *United States* v. *Alaska*, 422 U.S. 184 (1975). In that case this Court rejected the State's claim that Cook Inlet is an "historic bay," and thus a body of inland waters—a claim the State predicated in part on evidence that the federal government had asserted fisheries jurisdiction more than three miles from the shore within the inlet when

Alaska was a territory. This Court rejected the contention that such an exercise of jurisdiction by the United States constituted evidence that the area regulated was generally regarded as inland waters, explaining (422 U.S. at 198-199):

> The assertion of national jurisdiction over coastal waters for purposes of fisheries management frequently differs in geographic extent from the boundaries claimed as inland or even territorial waters. See, *e.g.*, Presidential Proclamation No. 2668, 59 Stat. 885 (1945). This limited circumscription of the traditional freedom of fishing on the high seas is based, in part, on the recognition of the special interest that a coastal state has in the preservation of the living resources in the high seas adjacent to its territorial sea. Convention on Fishing and Conservation of the Living Resources of the High Seas, Art. 6, ¶ 1, [Apr. 29, 1958, 17] U.S.T. 138, 141, T.I.A.S. No. 5969.

Nothing in the Court's opinion suggests, however, that such a limited exercise of jurisdiction by a nation state over areas of the high seas contiguous to its territorial sea authorizes a similar exercise of high seas jurisdiction by one of the states within the United States.

In sum, while Alaska might, on a proper factual record, have been able to justify, as a measure aimed at protecting resources within Alaskan territorial limits, the forfeiture of a ship such as the F/V American Eagle for the possession *within* those limits of crab taken from extraterritorial waters (see *Hjelle* v. *Brooks*, *supra*, 377 F. Supp. at 441), its direct regulation of the extraterritorial activities of non-Alaskans in this case clearly exceeded constitutional limits.

2. *Exclusive federal jurisdiction over resources of the outer continental shelf.* The decision below is also erroneous insofar as it rests on the view, expressed in *Alaska* v. *Bundrant*, *supra*, 546 P.2d at 538-548, that the United States does not possess an exclusive claim vis-a-vis the States to sedentary marine species, such as king crab, found upon the outer continental shelf.[7] The federal government has asserted exclusive jurisdiction over natural resources of the outer continental shelf since 1945, and this claim has been recognized by international agreement and domestic law. In particular, with respect to the coastal states of the United States, the "tidelands" litigation in this Court has implicitly recognized the exclusive federal right to such resources;[8] and this right is confirmed by the Outer Continental Shelf Lands Act, 43 U.S.C. 1331 *et seq.*, read together with the Submerged Lands Act, 43 U.S.C. 1301 *et seq.*

On September 28, 1945, President Truman issued a proclamation stating that "the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but

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[7] By "sedentary" we do not mean necessarily immobile. Rather, that is a technical term denoting marine creatures that cannot move except in constant contact with the seabed or subsoil. See Convention on the Continental Shelf, Apr. 29, 1958, 15 U.S.T. 471, 473, T.I.A.S. No. 5578.

[8] We use the term "tidelands litigation" to denote the numerous original actions in this Court between the United States and the various coastal states over the division of rights to natural resources seaward of the natural coastline. That litigation commenced with *United States* v. *California*, 332 U.S. 19 (1947). The disputes have continued to the present day and have involved every coastal state except Washington, Oregon, and Hawaii.

contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control." Pres. Proc. No. 2667, 59 Stat. 884 (1945). As Alaska correctly notes (Motion to Dismiss or Affirm 13-14), the proclamation was precipitated by a concern over mineral rights, notably oil and gas; and in the early tidelands litigation in which States sought to establish their own title to offshore resources, oil was the focus of dispute. See *United States* v. *Louisiana*, 339 U.S. 699 (1950); *United States* v. *Texas*, 339 U.S. 707 (1950). But as the Court remarked in the *Texas* case (339 U.S. at 719):

> Today the controversy is over oil. Tomorrow it may be over some other substance or mineral or perhaps the bed of the ocean itself. If the property, whatever it might be, lies seaward of the low-water mark, its use, disposition, management, and control involve national interests and national responsibilities. That is the source of the national rights in it.

In 1953, however, Congress enacted the Submerged Lands Act, 43 U.S.C. 1301 *et seq.*, expressly granting to the States exclusive rights to natural resources in the territorial sea—in most instances the area within three nautical miles offshore. In Section 9 of the Act, 43 U.S.C. 1302, however, Congress provided that nothing in the statute should be "deemed to affect in any wise the rights of the United States to the natural resources of that portion of the subsoil and seabed of the Continental Shelf lying seaward and outside of the area of lands beneath navigable waters * * *." In Section 2(e) of the Act, 43 U.S.C. 1301

(e), Congress defined "natural resources" as including "crabs."[9]

In that same year, Congress enacted the Outer Continental Shelf Lands Act, 43 U.S.C. 1331 *et seq.*, declaring to the world that the United States regarded, as subject to its jurisdiction, "the subsoil and seabed of the outer Continental Shelf." 43 U.S.C. 1332(a). In considering this legislation, Congress rejected an amendment offered by Senator Ellender that would have permitted coastal states to extend their jurisdiction, including their tax and conservation laws, to the lands of the outer continental shelf, insofar as such jurisdiction did not interfere with federal policies. 99 Cong. Rec. 7228, 7230-7231 (1953). That amendment was defeated. *Id.* at 7232. As the floor manager of the bill had explained, because of "the intermingling of national and international rights in the area," it was "important that the Federal Government, which has the responsibility for handling foreign relations, have the exclusive control of lawmaking and law enforcement there." 99 Cong. Rec. 6963 (1953) (remarks of Senator Cordon).

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[9] In testimony preceding the passage of the Submerged Lands Act, Congress had been reminded of the substance of the federal claims:

> [T]he Court has three times held that the Federal Government has full dominium and imperium over the submerged land and its resources as against the States, and that it is possessed of whatever is the most accurate description of the full power and right [to] take and enjoy the complete benefit of the mineral and other resources of the bed of the sea.

Submerged Lands: Hearings on S.J. Res. 20 Before the Senate Comm. on Interior and Insular Affairs, 82d Cong., 1st Sess. 376 (1951) (testimony of Solicitor General Perlman).

Five years later, in the Convention on the Continental Shelf, Apr. 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578, the United States signed an agreement with other nations in which, *inter alia*, the claim of the United States to the natural resources of adjacent continental shelf lands was recognized. Article 2.4 of that Convention defined natural resources as "mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil." 15 U.S.T. 473.

As the Fifth Circuit in *United States* v. *Ray*, 423 F.2d 16, 21 (1970) (recognizing exclusive federal jurisdiction over coral reefs on the continental shelf beyond state territorial waters) and the dissent in *Alaska* v. *Bundrant*, *supra*, 546 P.2d at 560-562, have correctly reasoned, the Continental Shelf Convention makes explicit what was implicit in the Outer Continental Shelf Lands Act—that the claim of the sovereign to natural resources of the subsoil and seabed of the outer continental shelf is not limited to minerals such as oil and gas, but includes other resources that exist in continuous contact with the seabed. Thus, the king crab in the area in which the violations were found in this case were within the exclusive jurisdiction of the federal government.[10]

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[10] To be sure, as appellee Alaska (Motion to Dismiss or Affirm 11-12) and the Alaska Supreme Court in *Alaska* v. *Bundrant*, *supra*, 546 P.2d at 546-547, point out, Congress disclaimed, in the Outer Continental Shelf Lands Act, any intention of affecting "the right to navigation and fishing." 43 U.S.C. 1332(b). But as the *Bundrant* dissent noted (546 P.2d at 561), reliance on this provision begs the question

3. *Limited significance of the case.* The alleged violations at issue here were committed in January 1976. Later that year, Congress enacted the Fishery Conservation and Management Act of 1976, 16 U.S.C. 1801 *et seq.* ("the Magnuson Act"), which provides for management by the United States of fishery resources, including king crab, within a fishery conservation zone contiguous to the territorial sea and extending 200 nautical miles from the coastline. 16 U.S.C. 1801-1802, 1811-1812. The Act provides for the development of regional fishery management plans by Regional Fishery Management Councils, bodies that include both federal and state representatives. 16 U.S.C. 1852(a)-(c), (h).

We are informed by the Department of Commerce that the North Pacific Fishery Management Council, which includes representatives from the State of Alaska, has prepared a draft "Fishery Management Plan for the King Crab Fishery of the Bering Sea and Aleutian Islands Area." That plan is to be submitted either this month or next to the Secretary of Commerce for review, and it is anticipated that the plan will be in effect by next fall. We are also informed that the plan provides for delegation of certain management tasks to state authorities, under federal oversight.[11]

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whether the harvesting of a sedentary species such as crab constitutes "fishing" within the meaning of the Act, and it disregards the established understanding in international law that the right to harvest crabs is not included in fishing rights.

[11] The Magnuson Act provides, in Section 306(a), 16 U.S.C. 1856(a), that "[n]o State may directly or indirectly regulate any fishing which is engaged in by any fishing vessel outside its boundaries, unless such vessel is registered under the laws of such State." The Act does not define the term "registered," and it has not been finally settled what constitutes registration

As explained above, since the violations for which the F/V American Eagle was declared forfeit were exclusively confined to waters beyond Alaska's three-mile limit, the case does not raise any question of the possible application of "landing law" statutes to non-Alaskan crabbers. For that reason, and because crab harvesting in the area is now controlled by the provisions of the Magnuson Act, the Court may deem it appropriate to reverse the judgment summarily.

CONCLUSION

The Court should note probable jurisdiction and reverse the judgment of the Supreme Court of the State of Alaska.

Respectfully submitted.

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for purposes of this provision. See *People* v. *Weeren*, 26 Cal. 3d 654, 607 P.2d 1279, 163 Cal. Rptr. 255 (1980). Because this case is not governed by the Magnuson Act, the question whether the F/V American Eagle was "registered" under the laws of Alaska within the meaning of Section 306(a) is not presented here.

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